(13)

No. 98-1480-CFX Title: Robert A. Beck, II, Petitioner
v.
Ronald M. Prupis, et al.

Docketed: March 17, 1999 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Mar 15 1999	Petition for writ of certiorari filed. (Response due May 7, 1999)
	Apr 1 1999	Order extending time to file response to petition until May 7, 1999.
	May 6 1999	Brief of respondents Leonard Bellezza, Wm. Paulus,Harry Olstein and Ernest Sabat in opposition filed.
	May 18 1999	DISTRIBUTED. June 3, 1999
	May 19 1999	Reply brief of petitioner Robert A. Beck filed.
	Jun 7 1999	Petition GRANTED. SET FOR ARGUMENT November 3, 1999. **********
	Jul 21 1999	Brief amicus curiae of National Whistleblower Center filed.
	Jul 22 1999	Joint appendix filed.
	Jul 22 1999	Joint appendix in two volumes
	Jul 22 1999	Brief of petitioner Robert A. Beck filed.
	Aug 5 1999	Order extending time to file respondents' brief on the merits to and including September 17, 1999
	Aug 23 1999	Brief of respondent Frederick Mezey filed.
	Sep 17 1999	Brief amici curiae of American Tort Reform Association, et al. filed.
	Sep 17 1999	Brief of respondents Leonard Bellezza, Wm. Paulus, Harry Olstein & Ernest Sabato filed.
	Sep 17 1999	Motion of Washington Legal Foundation, et al., for leave to file a brief as amici curiae filed.
	Sep 21 1999	CIRCULATED.
	Sep 27 1999	Motion of respondent Frederick Mezey for divided argument filed.
	Sep 30 1999	Respondents Bellezza, Olstein, Paulus and Sabato's response to respondent Frederick Mezey's motion for divided argument.
	Oct 4 1999	Motion of Washington Legal Foundation, et al., for leave to file a brief as amici curiae GRANTED.
	Oct 14 1999	Motion of Frederick Mezey for divided argument DISTRIBUTED (October 15, 1999).
	Oct 18 1999	Motion of respondent Frederick Mezey for divided argument DENIED.
	Oct 19 1999	Reply brief of petitioner Robert A. Beck filed.
	Nov 1 1999	Record filed.
	Nov 3 1999	ARGUED.
	Nov 4 1999	Record filed.

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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1998

ROBERT A. BECK, II,

Petitioner,

vs.

ROBERT M. PRUPIS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employee who is terminated for both blowing the whistle on and refusing to participate in a pattern of predicate acts of racketeering forbidden by the Racketeering and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, may assert a civil RICO conspiracy claim, where he has been injured by an overt act in furtherance of the RICO conspiracy, which overt act is not, itself, a predicate act of racketeering (a question as to which the circuit courts of appeal are in direct conflict).

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the District Court and Court of Appeals were:

Plaintiff Robert A. Beck, II, Petitioner here

Defendant Ronald M. Prupis, Respondent here

Defendant Leonard Bellezza, Respondent here

Defendant Ernest J. Sabato, Respondent here

Defendant William Paulus, Jr., Respondent here

Defendant Harry Olstein, Respondent here

Defendant Frederick C. Mezey, Respondent here

Defendant Joseph S. Littenberg, Respondent here

Defendant Byron L. Sparber, not a party here

Defendant Neil Prupis, not a party here

Defendant William Lipkind, not a party here

Defendant Firemark Consultants, Inc., not a party here

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert A. Beck, II ("Beck"), respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on December 15, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 162 F.3d 1090, and is reprinted in the appendix hereto, p. 1.

The opinion of the United States District Court for the Southern District of Florida (Roettger, D.J.) is unreported, but is reprinted in the appendix hereto, p. 23.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on December 15, 1998. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions at issue in this case are 18 U.S.C. §§ 1962(d) and 1964(c), which are reprinted in the appendix hereto, p. 47.

STATEMENT OF THE CASE

I. The Underlying Facts.[1]

This case arises out of the relationship between Beck, the plaintiff, and members of the board of directors of the Southeastern Insurance Group, Inc. ("SIG"). SIG was a holding company founded in 1983. It owned three subsidiaries, all of which were in the business of writing surety bonds for construction contractors. The defendants in this case were all directors of SIG at one time.

In 1987, some of the directors of SIG (including the defendants) began engaging in improper activity. For instance, they set up an entity called Construction Performance Corporation, which extracted substantial "fees" from otherwise non-creditworthy contractors in order to qualify them for SIG surety bonds, in violation of insurance regulations. The directors reneged on promises to indemnify certain contractors, and diverted corporate funds to their personal use. Finally, these directors knowingly classified certain SIG liabilities as assets on SIG's financial statements, causing the statements drastically to overestimate the corporation's value. These false financial statements were then given to regulators, shareholders, and creditors.

This misconduct eventually led to a lawsuit by the Florida Department of Insurance and a shareholders' derivative suit against SIG's officers and directors, filed in the United States District Court for the District of New

[1] The underlying facts are taken directly from the relevant portions of the Eleventh Circuit's December 15, 1998 opinion in this case. App. 2-4.

Jersey. In January 1990, as a result of the illegal activities of certain SIG directors and the consequent lawsuits, SIG filed for bankruptcy in the Southern District of Florida.

Meanwhile, in August 1983, SIG had hired Beck to serve as president and as a member of the board of directors. His employment contract, as revised in 1986, did not expire until 1991. The contract specified the grounds on which Beck's employment could justifiably be terminated, and stated that termination for any other reason would result in SIG being required to repurchase Beck's substantial stock holdings in the company. The repurchase price would be the fair market value of the stock as determined by an investment bank.

For most of his tenure, Beck was unaware of the illegal activities of the other SIG officers and directors. When he became aware of this misconduct in early 1988, he attempted to correct them internally and informed insurance regulators about improprieties in SIG's financial statements. The other directors, afraid that Beck might expose their misdeeds, arranged for a consulting firm to write a report criticizing Beck's performance, thus providing the directors an excuse to terminate Beck's employment without having to repurchase Beck's stock. In May 1988, Beck was fired for both his refusal to participate in the defendants' illegal conduct and his blowing the whistle on that conduct.

II. Beck's Claim.

Beck alleged and presented evidence that the defendant directors conspired, in violation of § 1962(d), to commit a pattern of racketeering activity, specifically mail

fraud, in violation of 18 U.S.C. § 1341, and wire fraud, in violation of 18 U.S.C. § 1343. Beck had been terminated for his refusal to participate in and his blowing the whistle on the defendant directors' RICO conspiracy. Beck's termination was an overt act in furtherance of the RICO conspiracy and, thus, he was injured by reason of a violation of 18 U.S.C. § 1962(d), giving him a private right of action pursuant to 18 U.S.C. § 1964(c). This is the only claim that is relevant to this petition.

This and Beck's other claims were originally brought as cross-claims while Beck was a defendant in the shareholders' derivative suit against SIG and its directors in the United States District Court for the District of New Jersey. Beck's cross-claims were subsequently severed and transferred to the Southern District of Florida. The shareholders' derivative suit was ultimately dismissed for procedural reasons.

III. The Decisions Below.

The United States District Court for the Southern District of Florida granted the defendant directors' Motion for Summary Judgment, holding that Beck lacked standing to assert a claim for a RICO conspiracy for either being "discharged in retaliation for reporting a RICO mail fraud scheme, or for refusing to participate in the scheme," citing the Eleventh Circuit cases of *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987) and *O'Malley v.*

O'Neill, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990). App. 42.[2]

While noting that Beck had set forth evidence of illegal conduct, the Eleventh Circuit held as follows:

> This case hinges on the following question: Must a plaintiff bringing a civil RICO conspiracy claim prove that the overt act (in furtherance of the conspiracy) by which he was injured was an "act of racketeering"? We answer this question in the affirmative, and therefore affirm the district court's grant of summary judgment.

Beck v. Prupis, 162 F.3d 1090, 1093 (11th Cir. 1998) (App. 2). In so holding, the circuit court expressly noted a conflict between the circuits on this issue, pointing to decisions from the Seventh, Third and Fifth Circuits that disagreed with its holding, and cases from the Eighth, Ninth and Second that agreed. *Id.* at 1098-99 (App. 14-16). The Eleventh Circuit also declined to apply this Court's recent opinion, *Salinas v. United States*, 522 U.S. 52 (1997), which holds that "criminal RICO conspiracy has no overt act requirement," to a civil RICO case. *Id.* at 1099 n.18 (App. 16-17).

This petition followed.

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[2] The district court also cited *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211 (5th Cir. 1988), which the Fifth Circuit has since limited to its facts (*see Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 152-53 (5th Cir. 1997)), and *Willis v. Lipton*, 947 F.2d 998 (1st Cir. 1991), in granting the Motion for Summary Judgment on this claim. App. 42.

REASONS FOR GRANTING THE WRIT

THERE IS A SHARP SPLIT AMONG THE CIRCUITS ON THE IMPORTANT FEDERAL ISSUE PRESENTED BY THIS PETITION.

This Petition for a Writ of Certiorari should be granted to review the Eleventh Circuit's holding that " . . . a plaintiff bringing a civil RICO conspiracy claim [must] prove that the overt act (in furtherance of the conspiracy) by which he was injured was an 'act of racketeering' " and that " . . . a terminated whistle-blower . . . has not suffered an injury that was proximately caused by the defendants' *racketeering* activities." *Beck v. Prupis*, 162 F.3d at 1093 and 1098 (App. 2 and 14-15). This is an important, recurring question of federal law. In the eight years since Justice White dissented from the denial of certiorari to resolve a split among the circuits (which, at the time, was two-to-one), *Reddy v. Litton Indus., Inc.*, 502 U.S. 921 (1991), the division in the circuits has widened dramatically to, currently, a five-to-three split.

Prior to this case, the most recent entry in this dispute between the circuits came in December 1997 from the Fifth Circuit, in *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143 (5th Cir. 1997),[3] *cert. granted, judgment vacated as moot*, ___ U.S. ___, 119 S.Ct. 442 (1998).[4] In *Khurana*, the Fifth Circuit joined the circuits that have held that "civil RICO standing for a § 1962(d) violation may be premised on injury proximately caused by overt acts in furtherance of the conspiracy that are *not* § 1961(1) predicate acts." *Id.* at 152.

> Like the Seventh Circuit, we refuse to place a limitation on RICO standing that RICO itself does not impose. Since § 1962(d) does not require that a predicate racketeering act actually be committed, it follows that the act causing a § 1964(c) claimant's injury need not be a predicate act of racketeering. A person injured by an overt act in furtherance of a RICO conspiracy has been injured by reason of the conspiracy, and thus has § 1964(c) standing. To interpret otherwise would ignore § 1964(c)'s provision for civil liability for, *inter alia*, a violation of § 1962(d) that proximately injures a person's property or business.

Id. at 153 (citations omitted). Prior to so holding, *Khurana* first discussed the "division of circuit authority" on this question, citing *Reddy v. Litton Indus., Inc.*, 502 U.S. 921 (1991) (White, J., dissenting from denial of *certiorari* and noting circuit split), and *Bowman v. Western Auto Supply Co.*, 985 F.2d 383 (8th Cir.) (collecting cases), *cert. denied*, 508 U.S. 957 (1993). *Id.* at 152.

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[3] *Khurana* limited a prior holding from the Fifth Circuit, *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211 (5th Cir. 1988), to its facts. *Khurana*, 130 F.3d at 152-53. Prior to that time, courts had cited *Cullom* as indicating that the Fifth Circuit was actually a member of the majority that held that a terminated whistleblower could not assert a RICO conspiracy claim. *See, e.g., O'Malley*, 887 F.2d at 1562-63; App. 42 (district court in the present case, whose decision preceded *Khurana*, cites *Cullom* as support for its holding on this issue).

[4] After the *Khurana* petition for a writ for certiorari was filed, the respondent indicated that he would withdraw his complaint, rather than opposing the petition. Thus, this Court, on the petitioners' application, granted certiorari, but vacated the judgment as moot, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

There can be no doubt as to the sharp division of circuits. In fact, in the present case, the Eleventh Circuit expressly noted this direct conflict between the circuits. *Beck*, 162 F.3d at 1098 and n.15, 16 and 17. The Third and Seventh Circuits have held that a person terminated for blowing the whistle on and/or refusing to participate in a pattern of racketeering has been injured by an overt act in furtherance of the conspiracy and, as such, has been injured as a result of the RICO conspiracy, and may, accordingly, assert a § 1964(c) civil RICO claim. *Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344 (7th Cir. 1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989); *see also Rehkop v. Berwick Healthcare Corp.*, 95 F.3d 285, 290 (3d Cir. 1996) (discussing split of circuits and following *Shearin*); *Gagan v. Am. Cablevision, Inc.*, 77 F.3d 951, 958-59 (7th Cir. 1996) (discussing split of circuits and following *Schiffels*). The First, Second, Eighth and Ninth Circuits have taken a diametrically opposite view. *See Miranda v. Ponce Federal Bank*, 948 F.2d 41 (1st Cir. 1991); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2d Cir. 1990); *Bowman v. Western Auto Supply Co.*, 985 F.2d 383 (8th Cir. 1992); and *Reddy v. Litton Indus., Inc.*, 912 F.2d 291 (9th Cir. 1990),[5] *cert. denied*, 502 U.S. 921 (1991). With

[5] While the Ninth Circuit made clear that it preferred the holding of *Hecht* to *Shearin*, its one opinion on the issue, *Reddy*, distinguishes *Shearin* on its facts, rather than expressly rejecting it. *Reddy*, 912 F.2d at 295 ("Because the hiring and discharge of the plaintiff in *Shearin* were acts that were 'essential' to the alleged conspiracy, the *Shearin* case is distinguishable on its facts from this appeal. If, however, there is any doctrinal inconsistency between *Hecht* and *Shearin*, we prefer the rule of *Hecht*."). Later, the Third Circuit made clear that *Shearin*'s holding was not to be so limited. *Rehkop*, 95 F.3d at 290 n.7

the two most recent decisions, *Khurana* and *Beck*, each joining one of the two camps, the current scorecard of circuits is five-to-three, with the narrow majority rejecting the terminated employee's ability to assert a civil RICO conspiracy claim.[6]

The commentators similarly are split in their analysis. *See, e.g.*, Brian M. Molinari, *Conspiracy Theory: The RICO Predicate Act Requirement for Wrongful Discharge Cases Brought Under 18 U.S.C. § 1962(d)*, 31 SUFFOLK U.L. REV. 481 (1997) (discussing split of authority and concluding that "the Third and Seventh Circuits . . . correctly apply *Sedima* and *Holmes* principles without losing sight of the plain statutory language of civil RICO."); Theresa

("Although Shearin's firing was essential to the conspiracy in her case, we did not hold that all overt acts that establish a conspiracy must be 'essential' to the existence of the conspiracy . . . Rather, we required only that an action must be 'in furtherance' of the conspiracy to be considered part of the RICO violation. Thus, there is no requirement that an action be essential to the conspiracy to be 'in furtherance' thereof.").

[6] In the Fourth Circuit, which has not yet decided the issue, there is a split among the district courts. *Compare Sadighi v. Daghighfekr*, ___ F.Supp.2d ___, 1999 WL 38430 (D.S.C. Jan. 22, 1999) (noting split of circuits, and stating that "the minority view appears persuasive," but holding that person terminated in furtherance of conspiracy had not been injured by a predicate act and, thus, could not state a civil claim for a § 1962(d) violation), *with Flinders v. Datasec Corp.*, 742 F.Supp. 929, 933-34 (E.D.Va. 1990) (noting split of circuits, reasoning that "the Third Circuit's approach is sounder and it follows more closely the plain meaning of the statute," and holding that "RICO conspiracy standing does not require an injury caused by a predicate offense"); *see also In re American Honda Motor Co. Dealership Relations Litig.*, 941 F.Supp. 528, 550 (D.Md. 1996) (noting that the "circuits are split").

E. Loscalzo and Stacy J. Levitan, *RICO Conspiracy: Whistleblowers – Coming in Through the Back Door*, 10 LABOR LAWYER 679 (1994) (noting that "[t]he United States Supreme Court has recently declined to address the conflict between circuits," and concluding that "the courts in *Shearin* and *Schiffels* have gone too far by allowing recovery under the auspices of RICO for non-RICO caused injuries.").

The rationales for allowing a person to assert a civil RICO conspiracy claim for an injury-causing overt act that is not also a predicate act of racketeering are well-established. 18 U.S.C. § 1964(c) allows suits by anyone "injured . . . by reason of a violation of section 1962." 18 U.S.C. § 1962(d) provides that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." Absent an ambiguity or conflict with a statute's legislative purpose, the plain meaning of the statute must control. *Khurana*, 130 F.3d at 153 (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989)).

> A person directly injured by an overt act in furtherance of a RICO conspiracy has been injured "by reason of" the conspiracy. Since a conspiracy to violate RICO's substantive provisions is itself a violation of RICO, a person injured "by reason of" the conspiracy has been injured "by reason of" the RICO violation. That is all that § 1964(c) requires for standing to bring a civil RICO action.

Schiffels, 978 F.2d at 349 (citations omitted). Furthermore, "[i]nterpreting § 1962(d) in this manner is consistent with common law concepts of conspiracy. A conspiracy to

violate RICO should not require anything beyond that required for a conspiracy to violate any other federal crime." *Gagan*, 77 F.3d at 959 (quoting *United States v. Neapolitan*, 791 F.2d 489, 497 (7th Cir. 1986)).

These courts refuse to place "a limitation on RICO standing that RICO itself does not impose." *Khurana*, 130 F.3d at 153 (citing *Schiffels*, 978 F.2d at 346). A RICO conspiracy does not require the commission of a predicate racketeering act, at all. *Shearin*, 885 F.2d at 1169. Thus, "it follows that the act causing plaintiff's injury need not be a predicate act of racketeering." *Id.*; *Schiffels*, 978 F.2d at 349; *Khurana*, 130 F.3d at 153. Otherwise, 1962(d) becomes superfluous to 1962(c) in the civil context. *Id.* "Buttressing this position is the Supreme Court's and Congress's direction that 'RICO is to be read broadly' and 'liberally construed to effectuate its remedial purpose.' " *Khurana*, 130 F.3d at 153 (quoting *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497-98 (1985), and Title IX of the Organized Crime Control Act of 1970, Pub.L. No. 91-452, § 904(a), 84 Stat. 947 (1970)). "A reading of §§ 1962(d) and 1964(c) that limits standing to sue for RICO conspiracy only to those injured by predicate acts – a limitation that does not appear on the face of those sections and is inconsistent with a natural reading of those sections – is inconsistent with this dictate." *Schiffels*, 978 F.2d at 350.

> Congress could have written RICO to state that only those injured by reason of predicate acts committed as part of a RICO violation could sue. It did not, and for courts to read § 1964(c)

> as if that is what Congress wrote would be tantamount to rewriting the statute.

Id.

Recently, this Court reiterated some of the underpinnings of these cases in *Salinas v. United States*, 522 U.S. 52 (1997), in which this Court established that:

> There is no requirement of some overt act or specific act in the statute before us [18 U.S.C. § 1962(d)], unlike the general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an "act to effect the object of the conspiracy." § 371. The RICO conspiracy provision, then, is even more comprehensive than the general conspiracy offense in § 371.
>
> In interpreting the provisions of § 1962(d), we adhere to a general rule: When Congress uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition. The relevant statutory phrase in § 1962(d) is "to conspire." We presume Congress intended to use the term in its conventional sense . . . .

Id., 522 U.S. at ___, 118 S.Ct. at 476-77 (citations omitted).

Salinas, thus, lends support to the rationales discussed above for holding that a civil RICO conspiracy claim *can* be made where the claimant has been injured by an overt act that is not a predicate act of racketeering.[7]

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[7] "While the Supreme Court has as yet declined to resolve the split among the circuits regarding RICO standing under § 1962(d), the *Salinas* decision supports the more liberal reading

The Eleventh Circuit, however, limited *Salinas* to only criminal RICO issues. *Beck*, 162 F.3d at 1099 n.18 (App. 16-17).[8]

Further, as noted in *Schiffels*, the proximate cause/direct injury requirement provided by *Holmes v. Securities Investor Protection Corp.* does place a limit " . . . under *Shearin*'s approach to standing," *Schiffels*, 978 F.2d at 350, appropriately confining the exercise of RICO jurisdiction to its heartland. Where

> . . . an employee is fired to prevent the employer from causing the conspiracy to unravel by disclosing the scheme[,] . . . [u]nlike in *Holmes*, the employee has been directly injured by the defendant's RICO violation. Just as important, the act causing the injury has been committed to further the conspiracy and is directly related to the conspiracy's goals. This brings the injured employee well within the zone of interests RICO is meant to protect.

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allowing standing to anyone injured by overt acts." W.B. Markovits, *Expanding RICO Civil Liability for Lawyers and Other "Outsiders": Perspectives of a Plaintiff's Lawyer*, 45 FED.LAW. 35, 38-39 (1998).

[8] This limitation, itself, conflicts with other decisions. *See, e.g., Kaplan v. Reed*, 28 F.Supp.2d 1191, 1197 (D.Col. 1998) (discussing *Salinas* in civil RICO case); *Amaker v. Coombe*, ___ F.Supp.2d ___, 1998 WL 637177 (S.D.N.Y. Sept. 16, 1998) (same); *Southern Intermodal Logistics, Inc. v. D.J. Powers Co.*, 10 F.Supp.2d 1337, 1361 n.45 (S.D.Ga. 1998) ("this Court will apply *Salinas* to this [civil] action."); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 7 F.Supp.2d 277, 288 n.6 (S.D.N.Y. 1998) (citing *Salinas* in civil RICO case).

Id. at 351; *see also* Keith S. Marks, Comment, *RICO Law – Wrongful Discharge and RICO Conspiracy Standing: The Holmes v. Securities Investor Protection Corp. Direct-Injury Test Resolves the Standing Issue*, 16 W.N.E. LAW REV. 365 (1994) (concluding that, under *Holmes*, " . . . predicate acts were not intended to serve as an independent limiting factor for RICO standing based upon a RICO conspiracy violation."). In addition,

> . . . the policy reasons for allowing whistle blowers, as opposed to non-participants, to sue under RICO are more persuasive because in addition to exposing the illegal scheme to the public by bringing a private suit, the whistle blower often times exposes the illegal scheme to the authorities and cooperates with the authorities, thus "strengthening the legal tools in the evidence-gathering process."

Cullom, 859 F.2d at 1217 (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, 1970 U.S. Code Cong. & Admin. News, 1073).

In this case, however, the Eleventh Circuit, after noting the "substantial debate in the federal courts of appeals regarding whether the overt act necessary for a RICO conspiracy must be an act of racketeering as defined in section 1961(1)," joined in the reasoning utilized by courts that reject a terminated employee's RICO conspiracy claim. *Beck*, 162 F.3d at 1098-99 (App. 14-17). The opinion states that *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), which holds that "a plaintiff's injuries must have been proximately caused by acts

of racketeering" applies "equally well to RICO's conspiracy provisions." *Beck*, 162 F.3d at 1098 (App. 15). Similarly, the Eleventh Circuit stated that "RICO was enacted with an express target – racketeering activity – and only those injuries that are proximately caused by racketeering activity should be actionable under the statute." *Id.* at 1098-99 (App. 15-16) (citing *Hecht*, 897 F.2d at 25, and H.R.Rep. No. 91-1549 (1970)).[9] While noting that suits such as Beck's "could perhaps have a deterrent effect on racketeering," the court stated that "we believe that such a claim goes further than what Congress has authorized under RICO." *Id.* at 1099 (App. 16). Last, the Eleventh Circuit noted the danger of allowing "plaintiffs to circumvent the requirements of the first three subsections simply by alleging a conspiracy." *Id.* (App. 16-17) (citing *Bowman*, 985 F.2d at 388). In stark contrast to the contrary view, circuits holding in this manner have stated, "[f]or judges, under a conspiracy rubric, to allow RICO damages for an injury caused other than by an enumerated predicate offense would be tantamount to rewriting the statute." *Miranda*, 948 F.2d at 48.

The two lines of competing decisions are well-developed at this point; the sharp conflict continues to grow in the absence of any definitive resolution by this Court. No purpose is served by allowing this recurring issue to continue to be unresolved and to "percolate" any longer.

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[9] As noted in *Khurana*, however, " . . . the provision for conspiracy violations was part and parcel of Congress's intent and plan and cannot be ignored. *See Sedima*, 473 U.S. at 499, 105 S.Ct. at 3286 (noting that although RICO used in ways not originally envisioned, Congress and not the courts must amend statute)." *Khurana*, 130 F.3d at 153.

The importance of resolving the conflict between the circuits is perhaps best reflected by the present case. Beck's claims were originally asserted as cross-claims in a case pending in the United States District Court for the District of New Jersey. Under the Third Circuit precedent binding on that court, Beck unquestionably would have prevailed and been able to assert his claim. *Shearin*, 885 F.2d at 1168-70 (terminated whistleblower could assert RICO conspiracy claim); *Rehkop*, 95 F.3d at 288-91 (same). Beck had been terminated for his refusal to participate in and his blowing the whistle on the defendant directors' pattern of illegal conduct. Accordingly, under the holdings of the Third, Fifth and Seventh Circuits, Beck was injured by an overt act in furtherance of the RICO conspiracy and, thus, could assert a RICO conspiracy claim for the damage he suffered by virtue of his termination. *Id.*; *see also Khurana*, 130 F.3d at 152-53 (terminated whistleblower could assert RICO conspiracy claim); *Schiffels*, 978 F.2d at 348-51 (same).

Beck's claims, however, were severed and transferred to the United States District Court for the Southern District of Florida. There, the Eleventh Circuit joined the opposite camp of authority, holding that, to establish a RICO conspiracy claim, the overt act by which a plaintiff claims injury must be a predicate act of racketeering, as well. *Beck*, 162 F.3d at 1098-99 (App. 14-17). The transfer from the Third Circuit to the Eleventh Circuit, thus, completely altered the outcome on the determination of this important federal question. The change in geography, within the federal system, should not have meant a total change in the applicable federal law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Robert A. BECK, II, Plaintiff-Appellant,

v.

Ronald M. PRUPIS, Leonard Bellezza, Ernest J. Sabato, William Paulus, Jr., Harry Olstein, Frederick C. Mezey, Byron L. Sparber, Joseph S. Littenberg, Defendants-Appellees.

Robert A. BECK, II, Plaintiff-Appellee,

v.

Ronald M. PRUPIS, Leonard Bellezza, Ernest J. Sabato, William Paulus, Jr., Harry Olstein, Frederick C. Mezey, Byron L. Sparber, Joseph S. Littenberg, Defendants-Appellants.

Nos. 95-4844, 95-5586.

United States Court of Appeals,
Eleventh Circuit.

Dec. 15, 1998.

Jay Starkman, Delgado, Befeler, Starkman & Magolnick, P.A., Miami, FL, Elizabeth J. DuFresne, Steel Hector & Davis, Miami, FL, for Appellant in No. 95-4844.

Bernard S. Mandler Gunster, Miami, FL, Michael M. Rosenbaum, Budd, Larner, Gross, Rosenbaum, Greenberg & Sade, Short Hills, NJ, Kenneth R. Hartmann, Kozyak, Tropin & Throckmorton, P.A., Miami, FL, for Appellees in No. 95-4844.

Michael M. Rosenbaum, Budd, Larner, Gross, Rosenbaum, Greenberg & Sade, Short Hills, NJ, Kenneth R. Hartmann, Kozyak, Tropin & Throckmorton, P.A., Miami, FL, for Appellants in No. 95-5586.

Jay Starkman, Delgado, Befeler, Starkman & Magolnick, P.A., Miami, FL, for Appellee in No. 95-5586.

Appeals from the United States District Court for the Southern District of Florida.

Before TJOFLAT and BARKETT, Circuit Judges, and GODBOLD, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

This case hinges on the following question: Must a plaintiff bringing a civil RICO conspiracy claim prove that the overt act (in furtherance of the conspiracy) by which he was injured was an "act of racketeering"? We answer this question in the affirmative, and therefore affirm the district court's grant of summary judgment.

I.

This case arises out of the relationship between Robert A. Beck, II, the plaintiff, and members of the board of directors of the Southeastern Insurance Group (SIG).[1] SIG was a holding company founded in 1983. It

[1] Beck's claims were originally brought as cross-claims while he was a defendant in a shareholder derivative suit against SIG and its directors in the United States District Court for the District of New Jersey. While that suit was pending, SIG filed for bankruptcy and the bankruptcy trustee retained plaintiffs' counsel (in the derivative suit) to represent the estate of SIG as a co-plaintiff in the derivative suit. Beck's cross-claims were subsequently severed and transferred to the Southern District of Florida, from which this appeal comes. For ease of discussion, we treat the cross-claims as an original lawsuit, and refer to the parties as plaintiff and defendants.

owned three subsidiaries, all of which were in the business of writing surety bonds for construction contractors. The defendants in this case were all directors of SIG at one time.

In 1987, some of the directors of SIG (including the defendants) began engaging in improper activity. For instance, they set up an entity called Construction Performance Corporation (CPC), which extracted substantial "fees" from otherwise non-creditworthy contractors in order to qualify them for SIG surety bonds, in violation of insurance regulations. The directors reneged on promises to indemnify certain contractors, and diverted corporate funds to their personal use. Finally, these directors knowingly classified certain SIG liabilities as assets on SIG's financial statements, causing the statements drastically to overestimate the corporation's value. These false financial statements were then given to regulators, shareholders, and creditors.

This misconduct eventually led to a lawsuit by the Florida Department of Insurance and a shareholders' derivative suit against SIG's officers and directors. In January 1990, as a result of the illegal activities of certain SIG directors and the consequent lawsuits, SIG filed for bankruptcy in the Southern District of Florida.

Meanwhile, in August 1983, SIG had hired Beck to serve as president and as a member of the board of directors.[2] His employment contract, as revised in 1986, did not expire until 1991. The contract specified the grounds on which Beck's employment could justifiably be

[2] Beck was also CEO of SIG for a portion of his presidency.

terminated,[3] and stated that termination for any other reason would result in SIG being required to repurchase Beck's substantial stock holdings in the company. The repurchase price would be the fair market value of the stock as determined by an investment bank.

For most of his tenure, Beck was unaware of the illegal activities of the other SIG officers and directors. When he became aware of this misconduct in early 1988, he attempted to correct them internally and informed insurance regulators about improprieties in SIG's financial statements. The other directors, afraid that Beck might expose their misdeeds, arranged for a consulting firm to write a report criticizing Beck's performance, thus providing the directors an excuse to terminate Beck's employment without having to repurchase Beck's stock. In May 1988, Beck was fired.

While president, Beck made a number of unwise (in retrospect) personal financial decisions in relation to SIG. He purchased, as part of a 1986 private placement, a $150,000 debenture and $75,000 worth of stock, and (together with other directors), in December 1987, personally guaranteed a $7.5 million bank loan to SIG. When SIG filed for bankruptcy, Beck's SIG investments became practically worthless, and he became potentially liable for the bank loan.[4]

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[3] One such ground was "[Beck's] inability or substantial failure to perform [his] material duties."

[4] Beck never actually had to pay any of the guaranteed amount, but is suing for the attorney's fees he incurred in the subsequent lawsuit brought by the bank.

Beck claims that SIG's other directors fraudulently induced him to make these financial decisions.[5] Specifically, Beck claims that the defendants' failure to tell him about his impending termination[6] or about the illegal activities at SIG induced him to purchased the debenture and the stock. For these same reasons, along with the defendants' issuance of erroneous financial statements, Beck claims that he was fraudulently induced to guarantee the bank loan and to retain his stock longer than he would have otherwise.

Beck claims that these inducements, as well as the creation of fictitious reasons for his firing, constitute mail fraud, *see* 18 U.S.C. § 1341 (1994), and wire fraud, *see* 18 U.S.C. § 1343 (1994), on the part of the defendants. Furthermore, Beck claims that the combination of these offenses constitutes a "pattern of racketeering activity"[7] under the federal Racketeer Influenced and Corrupt

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[5] All of the other SIG directors were originally named as defendants in Beck's cross-claim. Some of these directors have since been dismissed from the case pursuant to settlement agreements.

[6] Beck alleges that the SIG directors had been planning to terminate his employment as president and director as early as 1987 (even before he discovered their wrongdoing), but concealed these plans from him. In addition, Beck was removed from his position as CEO in 1986; Beck alleges that SIG's directors had been planning to remove him much earlier but waited until after he had invested in SIG's private placement.

[7] Section 1961(1) of RICO defines the activities that constitute "racketeering activity"; these include mail and wire fraud. Section 1961(5) defines a "pattern of racketeering activity" as at least two acts of racketeering activity within ten years of one another.

Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (1994), and that the defendants' participation in that pattern of racketeering activity injured him, giving him a private right of action based on RICO's substantive provisions. *See* 18 U.S.C. §§ 1962(c), 1964(c) (1994).[8] Beck also alleges that the defendants conspired to commit racketeering acts against third parties (through the phony financial statements, extortion of illegal fees, etc.); according to Beck, because his refusal to participate in and partial disclosure of that conspiracy resulted in his termination, he was injured "by reason of" the conspiracy and therefore has a claim under RICO's conspiracy provision, 18 U.S.C. § 1962(d).

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[8] Section 1964(c) of RICO creates a private right of action for anyone injured "by reason of" a violation of section 1962(a)-(d). Section 1962 consists of three substantive provisions, 18 U.S.C. § 1962(a)-(c), and one conspiracy provision, 18 U.S.C. § 1962(d). The three substantive provisions are structured as follows: Section 1962(a) prohibits the investment of proceeds derived from a pattern of racketeering activity in any enterprise involving interstate commerce. Section 1962(b) prohibits acquisition through a pattern of racketeering activity of any interest in an enterprise involving interstate commerce. Section 1962(c) prohibits participation in the conduct of an enterprise involving interstate commerce through a pattern of racketeering activity. Although Beck's cross-claim alleges violations of all three substantive provisions, he has not presented evidence to demonstrate that the defendants invested proceeds from the relevant racketeering activities in an enterprise involving interstate commerce, or that the defendants' racketeering activity led to acquisition of an interest in an enterprise involving interstate commerce. Beck therefore has no claim under section 1962(a) and (b). Beck has, however, presented evidence for a claim under section 1962(c); the alleged "enterprise" is SIG. We therefore treat all of his substantive claims as 1962(c) claims.

Beck sued the defendants for these alleged RICO violations, as well as numerous alleged violations of state law. The defendants moved for summary judgment and for sanctions pursuant to 28 U.S.C. § 1927 and Rule 11 of the Federal Rules of Civil Procedure. The district court granted the motion for summary judgment on Beck's RICO claims, and then declined to exercise supplemental jurisdiction over Beck's state law claims. The court denied the motion for sanctions. Beck appeals the summary judgment ruling, and the defendants appeal the denial of sanctions.

II.

Most of Beck's RICO claims allege substantive violations premised on 18 U.S.C. § 1962(c). We find these claims to be without merit, for the reasons discussed below.

A.

To prove any RICO violation, a plaintiff must prove the existence of a "pattern of racketeering activity." 18 U.S.C. § 1962. A variety of acts can constitute "racketeering activity," *see* 18 U.S.C. § 1961(1); the acts alleged in this case are mail and wire fraud, the substantive elements of which are identical.[9] *See Pelletier v. Zweifel*, 921 F.2d 1465, 1498 (11th Cir.1991). Both offenses consist of intentional participation in a scheme to defraud another of money or property. *See id.* A "scheme to defraud"

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[9] The only difference between the two offenses is their jurisdictional basis – mail fraud requires proof of the use of the mails, while wire fraud requires proof of the use of the wires.

involves the making of misrepresentations intended and reasonably calculated to deceive persons of ordinary prudence and comprehension. *See id.* at 1498-99. This means, *inter alia*, that the plaintiff must prove that a reasonable person would have relied on the misrepresentations. *See United States v. Brown*, 79 F.3d 1550, 1557 (11th Cir.1996).

In addition to proving racketeering activity, a civil RICO plaintiff must show that the racketeering activity caused him to suffer an injury. *See* 18 U.S.C. § 1964(c). This is true even when a criminal conviction for the underlying racketeering activity would not require a showing of actual injury, as is the case with mail and wire fraud. *See Pelletier*, 921 F.2d at 1499. Furthermore, the racketeering activity must be more than simply the "but for" cause of the injury; it must also be the proximate cause. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 1317-18, 117 L.Ed.2d 532 (1992). "[A] factor is a proximate cause if it is a substantial factor in the sequence of responsible causation." *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir.1994) (internal quotation omitted).

Because this case comes to us on a granted motion for summary judgment, we have viewed all evidence in favor of the non-moving party (i.e., Beck). *See Rayle Tech, Inc. v. DEKALB Swine Breeders, Inc.*, 133 F.3d 1405, 1409 (11th Cir.1998). Summary judgment is to be granted when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment is appropriate where the moving party shows an absence of evidence to support an essential element of the nonmoving party's case. *See Weiss v. School*

Bd. of Hillsborough County, 141 F.3d 990, 994 (11th Cir.1998). For each alleged RICO violation in this case, Beck has failed to produce evidence to support at least one of the essential elements of a RICO claim based on mail and wire fraud. For this reason, we affirm the district court's grant of summary judgment.[10]

B.

Beck claims that he was fraudulently induced to make certain unwise financial decisions in three ways: (1) the defendants' failure to tell him about his impending

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[10] The district court held that Beck's injuries are based on his status as a creditor and stockholder, and that his injuries are therefore too indirect to give him standing under RICO. The district court is correct that a creditor or stockholder lacks standing when his claim is based solely on acts of racketeering that target the corporation. *See Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 906 (11th Cir.1998); *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir.1987). A plaintiff's status as a creditor or stockholder, however, does not preclude standing for RICO violations if the plaintiff has alleged an injury proximately caused by the defendants' acts of racketeering that target the plaintiff. *See id.* at 1530-31. In this case, Beck has properly set forth claims of injury proximately caused by racketeering activity that targeted him. We therefore hold that he has standing under RICO. However, after numerous pleadings, depositions, and affidavits, Beck has not brought forward evidence that would create a genuine issue of material fact on certain key elements of his claims. Thus, we affirm the decision of the district court, but on different grounds. *See Turner v. American Fed. of Teachers Local 1565*, 138 F.3d 878, 880 n. 1 (11th Cir.1998) ("We must affirm the judgment of the district court if the result is correct even if the district court relied upon a wrong ground or gave a wrong reason.").

termination, (2) the defendants' failure to inform him of their illegal activities, and (3) the defendants' creation of false financial statements. Although two of these inducements are omissions rather than direct misrepresentations, material omissions can be the basis for a claim of fraud if they are intended to create a fraudulent representation. *See United States v. O'Malley*, 707 F.2d 1240, 1247 (11th Cir.1983).

The defendants' failure to tell Beck of his impending termination cannot serve as the basis for a claim of fraud, because a reasonable person making financial decisions would not have relied on such an omission. Beck's employment contract makes no guarantee of employment throughout the term of the contract. On the contrary, the contract has an explicit termination provision that prescribes, in substantial detail, what is to happen if SIG terminates Beck's employment for any reason. Thus, the employment contract itself explicitly contemplates the possibility of termination (both "for cause" and "without cause"), and Beck therefore could not have reasonably relied on continuing employment.[11] Furthermore, Beck has presented no evidence that the defendants refrained from telling him of his impending termination in an attempt to induce him to make financial commitments to

[11] Beck also claims that the private placement memorandum issued in conjunction with the stock/debenture offering in which he invested contained an affirmative misrepresentation that he would continue as president and CEO of SIG. This alleged "misrepresentation," however, is merely a list of the current officers and directors of SIG; it cannot reasonably be read as a promise of continuing employment.

SIG. He therefore has not proven the essential element of intent.

The defendants' failure to tell Beck about their illegal activities also cannot serve as the basis for a claim of fraud, because, here again, Beck has presented no evidence of the defendants' fraudulent intent to induce Beck to make these investment decisions. The usual reason why people do not disclose that they are engaging in illegal activity is that they do not want to get caught, not because they want to induce others to invest. Beck has produced no evidence suggesting that, in this case, the omission was intended to induce Beck to make financial commitments to the company. Also, Beck has presented no evidence that this omission proximately caused his losses. He has repeatedly stated that had he known about the illegal activities, he would not have made the same financial decisions. As noted above, however, this type of "but for" causation is insufficient to sustain a claim of fraud. Instead, proximate cause is required, meaning that this omission must have been a "substantial factor" in his decisionmaking. *See Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir.1994); *see also Brandenburg v. Seidel*, 859 F.2d 1179, 1189 (4th Cir.1988) (stating that the inquiry in determining the existence of proximate cause is "whether the conduct has been so significant and important a cause that the defendant should be held responsible" (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 42 (5th ed.1984))). Beck has presented no evidence (other than the "but for" testimony) that one of the substantial factors

in his decision to make certain financial commitments to SIG was his belief that the company was run legally.[12]

Finally, the defendants' creation of false financial statements cannot serve as the basis for Beck's allegations of fraud, again because of a lack of evidence of fraudulent intent toward Beck.[13] It is surely true that, if the defendants misrepresented certain transactions and intentionally overstated the value of SIG, they intended to deceive someone. There is no evidence, however, that the someone to be deceived was Beck. The more likely target of deception, based on the evidence, was First Fidelity Bank, from whom SIG was seeking a loan. Beck has also failed to demonstrate proximate cause -- he has presented no evidence that he actually saw, let alone relied upon, any false financial statements prior to making his financial decisions.[14]

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[12] Beck has also suggested that the defendants' illegal activities led to SIG's demise, which in turn caused Beck's losses (the reduction in value of his investments and the accountability for the loan he guaranteed). This claim is clearly barred by the proximate cause requirement – the detrimental effects of racketeering activity directed toward a third party (in this case, SIG) are not actionable under RICO. *See Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 906 (11th Cir.1998). This is the type of derivative claim that the district court correctly held does not confer standing under RICO. *See supra* note 10.

[13] The same is true of the erroneous "Claims Summaries" on which Beck claims to have relied.

[14] Beck also suggests that the defendants' failure to inform him of the illegal transaction that led to the creation of the inaccurate financial statements constitutes a fraudulent misrepresentation by omission. This claim – that the concealment of SIG's illegal activities constitutes a fraudulent inducement – has already been addressed.

C.

Beck also alleges that the defendants violated RICO by creating fraudulent reasons for terminating his employment. The purported fraud consists of arranging for a consulting group to issue a report containing false allegations regarding Beck's job performance, and then using this report as a basis for firing him. It does not appear, however, that Beck was injured through reliance on the fraudulent report. The only persons who might have relied on the report are the directors of SIG, when making their decision to terminate Beck. Because Beck did not rely to his detriment on the alleged misrepresentations, these misrepresentations are not the proximate cause of Beck's injury. *See Pelletier*, 921 F.2d at 1499-1500.

Furthermore, as with Beck's other claims, there is no evidence of the defendants' intent to defraud Beck. Indeed, Beck claims not to have been deceived at all – he has long been aware that the allegations in the consulting report were false, and that the true reason he was fired was that he posed a threat to the defendants' illegal activities. The apparent object of the defendants' fraud was a prospective court, one that might someday hear a claim by Beck of breach of contract. In essence, Beck's claim in regard to his firing is that SIG ought to have been required to repurchase his stock and breached its contract by not doing so. Whatever the merits of this claim at common law, it is different from a federal statutory claim that the defendants committed mail and wire

fraud in firing Beck. Consequently, Beck's firing is not an act of racketeering under RICO.

III.

Beck's allegation that he was fired for pretextual reasons is also the basis for his claim under RICO's conspiracy provision, 18 U.S.C. § 1962(d). A civil RICO conspiracy claim requires a showing of the existence of a conspiracy, and the commission of an overt act in furtherance of the conspiracy that causes injury to the plaintiff. *See Bivens Gardens Office Bldg., Inc. v. Barnett Bank of Fla., Inc.*, 906 F.2d 1546, 1550 n. 7 (11th Cir.1990). Beck argues that the defendants' conspiracy to commit various racketeering activities led to his firing (because Beck refused to participate in such activities and because Beck "blew the whistle" on certain SIG misconduct); he therefore suffered injury resulting from an overt act (the wrongful termination) done in furtherance of the conspiracy. To support this argument, Beck relies on cases from other circuits holding that a terminated "whistle blower" has standing to bring a claim under RICO's conspiracy provision, even if no such claim is available under RICO's substantive provisions.[15]

The Eleventh Circuit, however, has apparently rejected this reasoning, and rightly so – a terminated

[15] *See Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344 (7th Cir.1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir.1989). *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 153-54 (5th Cir.1997), decided subsequent to argument in this case, also supports Beck's claim.

whistle blower, although he may have a wrongful termination claim, has not suffered an injury that was proximately caused by the defendants' *racketeering* activities. *See Morast v. Lance*, 807 F.2d 926, 933 (11th Cir.1987) (holding that retaliatory discharge for blowing the whistle, standing alone, is not grounds for a RICO conspiracy claim); *O'Malley v. O'Neill*, 887 F.2d 1557, 1561-62 (11th Cir.1989) (broadening *Morast's* holding regarding whistle blower claims to include refusal to participate in illegal activity).[16] There is a substantial debate in the federal courts of appeals regarding whether the overt act necessary for a RICO conspiracy must be an act of racketeering as defined in section 1961(1).[17] In the context of RICO's substantive provisions, the Supreme Court has held that a plaintiff's injuries must have been proximately caused by acts of racketeering. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-69, 112 S.Ct. 1311, 1316-18, 117 L.Ed.2d 532 (1992). We believe that this reasoning applies equally well to RICO's conspiracy provisions. Furthermore, RICO was enacted with an express target – racketeering activity – and only those injuries that are

[16] The majority of other circuits considering this issue have also concluded that allegations of retaliatory discharge for interference with racketeering activity ("whistle blower" claims) do not satisfy RICO's proximate cause requirement. *See Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir.1993); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 48 (1st Cir.1991); *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 294-95 (9th Cir.1990); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir.1990).

[17] *See* cases cited in notes 15 and 16, *supra*; *see also Rehkop v. Berwick Healthcare Corp.*, 95 F.3d 285, 290 (3d Cir.1996); *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1344-46 (2d Cir.1994).

proximately caused by racketeering activity should be actionable under the statute. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir.1990) ("Congress did not deploy RICO as an instrument against all unlawful acts. It targeted only predicate acts catalogued under section 1961(1)."); *cf.* H.R.Rep. No. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4032 ("If there is no racketeering activity . . . there can be no violation of the provisions of this title."). Although a "whistle blower" claim such as Beck's could perhaps have a deterrent effect on racketeering, we believe that such a claim goes further than what Congress has authorized under RICO. As the Supreme Court noted in *Holmes*, the need to deter injurious conduct can be amply met through suits by those persons directly injured. *See Holmes*, 503 U.S. at 269-70, 112 S.Ct. at 1318-19.

The requirement that a civil RICO plaintiff prove injury resulting from a racketeering act does not, as Beck and some courts have suggested, render the RICO conspiracy provision superfluous. *See Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143, 153 (5th Cir.1997); *Bowman v. Western Auto Supply*, 985 F.2d 383, 388 (8th Cir.1993). Rather, the conspiracy provision allows persons who are responsible for an injury, but did not actually participate in the injury-causing activity, to be held liable.[18] Furthermore, requiring proof of direct injury by

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[18] The function of a conspiracy claim differs in criminal and civil cases. In a criminal context, the purpose of conspiracy charges is to punish the act of agreement itself. *See* Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 6.4(d) (2d ed.1986). Agreements to engage in criminal activity are considered dangerous to society in and of themselves, because

racketeering activity for section 1962(a)-(c), but not for section 1962(d), would (in addition to being logically inconsistent) allow plaintiffs to circumvent the requirements of the first three subsections simply by alleging a conspiracy. *See id.*

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of "the special danger incident to group activity." *Id.* at § 6.4(c). Thus, for a criminal conspiracy charge, there is no need to prove that the conspiracy led to an injury-causing criminal activity. In a civil context, however, the purpose of a conspiracy claim is to impute liability – to make X jointly liable with D for what D did to P. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 46 (5th ed.1984). Thus, a civil conspiracy plaintiff must prove that someone in the conspiracy committed a tortious act that proximately caused his injury; the plaintiff can then hold other members of the conspiracy liable for that injury. Those courts that have recognized a claim such as Beck's usually rely on criminal RICO cases, thus demonstrating a possible confusion about the separate functions of civil and criminal conspiracy claims. *See Schiffels*, 978 F.2d at 348 (relying on numerous criminal cases); *Shearin*, 885 F.2d at 1169 (relying on criminal case of *United States v. Brooklier*, 685 F.2d 1208 (9th Cir.1982)).

This distinction also explains why *Salinas v. United States*, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997), relied upon by Beck, is not relevant here. *Salinas* states that criminal RICO conspiracy has no overt act requirement – the agreement itself is sufficient to establish culpability. This is a very different matter from the requirements for civil RICO conspiracy:

> [A]lthough an overt act by itself . . . is not a requisite element of a section 1962(d) criminal conspiracy violation, we hold that injury from an overt act is necessary and sufficient to establish civil standing for a RICO conspiracy violation. We cannot agree, however, with cases . . . that find standing on the basis of *any* overt act in furtherance of the conspiracy, even if it is not a predicate racketeering act.

Hecht, 897 F.2d at 25 (citation omitted).

As discussed in part II.C, *supra*, Beck has presented no evidence that his termination was the result of racketeering activity directed toward him. Thus, we affirm the district court's grant of summary judgment on Beck's RICO conspiracy claim.

IV.

The district court, upon granting summary judgment on Beck's only federal claim (the RICO claim), declined to exercise supplemental jurisdiction over Beck's remaining state law claims. The exercise of supplemental jurisdiction is left to the discretion of the district court; we review for an abuse of discretion. *See Edwards v. Okaloosa County*, 5 F.3d 1431, 1433 (11th Cir.1993). We find such an abuse here, and therefore reverse the district court's ruling.

The district court's ruling improperly relied on 28 U.S.C. § 1367(c)(3). Section 1367 applies only to civil actions commenced after December 1, 1990. *See* Judicial Improvements Act of 1990, Pub.L. No. 101-650, § 310(c), 104 Stat. 5089, 5114 (1990). Beck's cross-claim was filed on May 28, 1990. Thus, the common law of pendent jurisdiction, rather than section 1367, applies to this case.

Ordinarily, this distinction would be of little importance. *See Kaufman v. Checkers Drive-In Restaurants, Inc.*, 122 F.3d 892, 893 n. 2 (11th Cir.1997) (noting that section 1367 codifies pre-existing criteria for exercising pendent jurisdiction). However, a dismissal under section 1367 automatically tolls the statute of limitations on the dismissed claims for 30 days, *see* 28 U.S.C. § 1367(d) (1994),

while a dismissal under the doctrine of pendent jurisdiction does not have this effect. Beck claims that the applicable statute of limitations would bar his state law claims if they were dismissed at this stage. The possibility of a claim being time-barred is an important factor in deciding whether to maintain jurisdiction over pendent claims once the federal claims have been resolved; dismissing state law claims for which the statute of limitations has run will often constitute an abuse of discretion. *See Edwards*, 5 F.3d at 1435; *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 430 (11th Cir.1984); *Pharo v. Smith*, 625 F.2d 1226, 1227 (5th Cir.1980).[19]

The district court presumably did not address the statute of limitations issue because it assumed that Beck's state law claims would be protected under 28 U.S.C. § 1367(d). Because section 1367 is not the applicable law, the district court's decision leaves the status of Beck's state law claims unclear.[20] We therefore reverse the district court's ruling on this issue and remand for further consideration of Beck's pendent state law claims.

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[19] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[20] If the district court intended to refuse to exercise pendent jurisdiction while still preserving Beck's state law claims for review in state court, it could accomplish this on remand by requiring the defendants to file a waiver of any statute of limitations defense as a condition of dismissal. *See Edwards*, 5 F.3d at 1435 n. 3.

V.

The defendants moved for sanctions against Beck under Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927. The district court denied both motions; we review for an abuse of discretion. *See Glatter v. Mroz (In re Mroz)*, 65 F.3d 1567, 1571-72 (11th Cir.1995). We do not find Beck's claims to be so meritless that the district court's denial of sanctions constitutes an abuse of discretion.[21]

The defendants also challenge the district court's ruling on their motion to tax costs to the plaintiff. The defendants moved to tax the costs of all depositions taken, of photocopying necessary in conjunction with document production, of serving various subpoenas and summonses, and of the court costs affiliated with appearing *pro hac* vice. The district court taxed to Beck only those costs incurred in deposing him and in photocopying the motion for summary judgment. This ruling is reviewed for an abuse of discretion, *see Tanker Management, Inc. v. Brunson*, 918 F.2d 1524, 1527 (11th Cir.1990); we find no such abuse here.

VI.

Defendant Byron L. Sparber was dismissed from this action on the ground of inadequate service of process.

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[21] The parties dispute which version of Rule 11 (the pre-1993 or post-1993 version) applies, because the defendants concede that they did not comply with the 21-day safe harbor provision found in the post-1993 version. *See* Fed.R.Civ.P. 11(c)(1)(A). We do not reach this issue, because we conclude that, even if the pre-1993 version applies, there was no abuse of discretion.

Beck concedes that service was improper, but argues that Sparber should be barred from claiming inadequate service of process under the doctrine of laches. Specifically, Beck argues that Sparber's delay in raising this issue has created the possibility that Beck's claims against Sparber will be time-barred. Furthermore, Beck argues that Sparber has waived any defense of inadequate service of process through a notice of appearance filed by his attorney (which Sparber and his attorney claim was filed inadvertently) and by the involvement of Sparber's attorney in the case (which Sparber's attorney claims was solely on behalf of another client, defendant Joseph S. Littenberg).

Although we review the district court's interpretation of the Federal Rules of Civil Procedure *de novo, see Silvious v. Pharaon*, 54 F.3d 697, 700 (11th Cir.1995), we review the district court's factual findings only for clear error, *see American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir.1998). The district court's decision in this matter was based primarily on a series of factual determinations – whether Sparber or Beck is to blame for the delay, whether Sparber's notice of appearance was inadvertent, whether Sparber's attorney was solely representing Littenberg during the proceedings, and so forth. We cannot say that the district court's factual findings in this regard were clearly erroneous, and we therefore affirm the district court's dismissal of Sparber from this action.

VII.

For the foregoing reasons, we AFFIRM the district court's grant of the defendants' motions for summary judgment; we VACATE the district court's dismissal of Beck's state law claims and REMAND the case with the instruction that the district court reconsider its order dismissing Beck's pendent state law claims; we AFFIRM the district court's denial of sanctions; we AFFIRM the district court's ruling on the defendants' motion to tax costs; and we AFFIRM the district court's dismissal of defendant Sparber from this action.

SO ORDERED.

ROBERT A. BECK,

Plaintiff,

v.

RONALD M. PRUPIS, ET AL.,

Defendants,

_____/

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO: 91-8121-CIV-ROETTGER

ORDER ON THE BELLEZA GROUP'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court on defendants Leonard Belleza, Ernest J. Sabato, William Paulus and Harry Olstein's (the Belleza Group's) motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure. A hearing was held on the motion on Friday, April 28, 1995.

A. FACTUAL BACKGROUND

The Southeastern Insurance Group, Inc. ("SIG") was a holding company whose subsidiaries operated various businesses, including insurance and surety. Plaintiff Robert A. Beck first became associated with SIG on August 22, 1983 when he was hired under a five-year employment contract as President of SIG. Beck's contract was later extended. In August, 1986, Beck made an unsecured personal loan to SIG in the amount of $150,000. Around December, 1987, Beck personally guaranteed a $7.5 million loan from First Fidelity Bank to SIG. SIG eventually defaulted on the First Fidelity loan and First Fidelity sued Beck on the personal guarantee. Beck

also purchased stock in SIG during his employment there. In addition to his role as President, Beck later was named Chief Executive Officer of SIG. On May 13, 1988, SIG's Board of Directors voted unanimously with the exception of Beck to terminate Beck "for cause." On January 5, 1990, SIG filed a petition for bankruptcy in the Southern District of Florida.

Beck alleges that beginning in the fall of 1985, the defendants devised a scheme to defraud Beck and others and, in addition, used their positions at SIG to extort potential customers. Beck alleges that as part of this scheme to defraud, the defendants fraudulently induced Beck to make the unsecured $150,000 loan to SIG and to be a personal guarantor on the $7.5 million First Fidelity loan to SIG. Beck further alleges that the defendants fraudulently induced him not to sell his stock in SIG by concealing from him the allegedly illegal activities of SIG. Beck further alleges that when he, as President of SIG, became a threat to the continued racketeering conduct of the defendants, the defendants fraudulently created causes for Beck's termination.

B. PROCEDURAL HISTORY

Beck's claims come to this court by way of a state court action and a crossclaim in a federal action in New Jersey. On May 15, 1989, Beck filed a complaint in Dade County Circuit Court under Florida's civil RICO act, *Fla. Stat. Ann.* § 772.101 *et seq.*, and Florida common law. He named as defendants all of the defendants in the present action plus SIG, itself. The defendants filed a motion to dismiss challenging Beck's standing to allege claims

under Florida's RICO provisions and Beck's ability to state claims on which relief may be granted on the common law counts. On November 28, 1989, the court entered an order granting in part and denying in part the defendants' motion to dismiss. On the RICO standing issue, the court held that Beck had standing to allege conspiracy to violate Florida's RICO act. But the court held that Beck did not have standing to allege violations of the substantive provisions of Florida's RICO act.[1] After the order had been entered, Beck voluntarily dismissed the remaining counts pursuant to Rule 1.420, Florida Rules of Civil Procedure.

In the meantime, on August 10, 1989, the New Jersey State Insurance Commissioner as Receiver had filed suit in federal court in New Jersey naming SIG and its officers and directors as defendants. These officers and directors included Beck and the defendants Beck had named in his state court action. Having dismissed his state court action, Beck then filed a crossclaim against the remaining defendants in the New Jersey action. The crossclaim contained ten counts including four counts under the federal civil RICO provisions, Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* – three

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[1] The order also disposed of the common law counts. It denied the motion to dismiss count V, alleging breach of contract, granted the motion to dismiss counts VI and VII, tortious interference and conspiracy to tortiously interfere, respectively, and granted Beck leave to amend counts VIII and IX, defamation and conspiracy to defame, to plead those counts with additional specificity.

substantive claims and one conspiracy claim.[2] After the court in New Jersey dismissed the underlying complaint to which Beck had appended his crossclaim, it transferred Beck's crossclaim to this district. The present action is Beck's crossclaim.

This action now is before the court on the Belleza Group's motion for summary judgment. In it, the Belleza Group argues that Beck lacks standing to bring RICO claims. They first argue that *res judicata* bars Beck's claims because he did not assert them in the prior state court action that the Belleza Group alleges was based on the same underlying facts. Alternatively, they argue that Beck lacks standing to bring a RICO claim because his injuries are derivative and not direct.

C. RES JUDICATA

Res judicata encompasses two different preclusion doctrines: claim preclusion and issue preclusion. *Pelletier v. Zweifel*, 921 F.2d 1465, 1501 (11th Cir. 1991). Claim preclusion bars the litigation of matters that could have been litigated in an earlier suit, but were not. *Id.*; *Albrecht v. State*, 444 So.2d 8 (Fla. 1984). Issue preclusion bars the relitigation of matters that were actually litigated and decided in a prior suit. *Pelletier v. Zweifel*, 921 F.2d at 1501; *see also Stogniew v. McQueen*, 1995 Fla. LEXIS 679 (Fla. 1995).

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[2] Beck's crossclaim also contained six counts brought under Florida common law alleging theories of fraud, negligence, and fraudulent inducement.

1. CLAIM PRECLUSION

Claim preclusion bars a plaintiff from bringing a subsequent lawsuit when four requirements are met: (1) there must be a final judgment on the merits, (2) the prior decision must be rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, must be identical in both suits, and (4) the same cause of action must be involved in both cases. *Pelletier v. Zweifel*, 921 F.2d at 1501; *see also Stogniew v. McQueen*, 1995 Fla. LEXIS 679 (Fla. 1995).

Regarding the first requirement – that there be a final judgment on the merits – the Full Faith and Credit implementing statute, 28 U.S.C. § 1738, requires this court to give the same dignity to a judgment rendered by a Florida court as would another Florida court. *Pelletier*, 921 F.2d at 1501; *see also Luebke v. Marine National Bank of Neenah*, 567 F. Supp. 1460, 1461 (E.D. Wisc. 1983).

The issue here presented thus is whether a Florida court would consider Beck's action in Dade Circuit Court to have given rise to a valid final judgment. Under Florida law, a final judgment is one that determines the rights of the parties and disposes of the case on the merits, leaving nothing more to be done in the case except execution. *Allie v. Ionata*, 503 So.2d 1237 (Fla. 1987).

The Dade Circuit Court's order granting in part and denying in part defendants' motion to dismiss cannot be considered final judgment for the purposes of claim preclusion. It dismissed certain counts of Beck's complaint because Beck lacked standing to bring substantive claims under Florida's RICO act. But it left standing other counts and allowed Beck the opportunity to amend still other

counts. The order did not determine the rights of the parties and dispose of the case on the merits. Moreover, because counts remained undisposed of, it did not leave nothing more to be done in the case except execution. As a result, it was not a final judgment even as to the counts dismissed with prejudice.

Thereafter, Beck voluntarily dismissed without prejudice the remaining counts of the case. Rule 1.420, Florida Rules of Civil Procedure, gives a party an *absolute* right to take a voluntary dismissal at any time prior to a hearing on a motion for summary judgment, before the jury retires, or before submission of a nonjury case to the court. *Baker v. Firestone Tire & Rubber Co.*, 537 F. Supp. 244, 247 (S.D. Fla. 1982) (emphasis added); *Fears v. Lunsford*, 314 So.2d 578 (Fla. 1975); *see also* 1 Fla. Jur. 2d § 109. Under the Florida Rules of Civil Procedure, like the Federal Rules of Civil Procedure, a voluntary dismissal without prejudice simply is not a final decision on the merits. *See New Port Largo, Inc. v. Monroe County*, 706 F. Supp. 1507, 1513 (S.D. Fla. 1988) ("Florida courts generally consider voluntary dismissal to be beyond the scope of res judicata."); 33 Florida Jur. 2d § 173; *see also In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F.2d 213 (8th Cir. 1977) (analyzing the effect of voluntary dismissal under Rule 41, Federal Rules of Civil Procedure) ("The effect of a voluntary dismissal without prejudice is to render the proceedings a nullity and leave the parties as if the action had never been brought. It carries down with it previous proceedings and orders in the action, and all pleadings, both of plaintiff and defendants, and all issues, with respect to plaintiff's claim.").

As a result, there was never a final judgment on the merits in the Dade Circuit case. By voluntarily dismissing his state court suit Beck terminated the litigation instantaneously. *See Baker v. Firestone Tire & Rubber Co.*, 537 F. Supp. at 247. Because the dismissal was without prejudice, Beck was free to commence a wholly new lawsuit against the same defendants (assuming the right to do so had not been exercised before and was not then barred by the statute of limitations – neither issue having been raised here). *See id.* Accordingly, no claim preclusion applies to the case.

2. ISSUE PRECLUSION

Issue preclusion presents a closer question, but nevertheless cannot apply here. Issue preclusion[3] estops parties from litigating in a second suit an issue that was "actually litigated" in the prior suit and that is common to both the first and second causes of action. *Pelletier v. Sweifel*, [sic] 921 F.2d 1465, 1501 (11th Cir. 1991); *Gjellum v. City of Birmingham, Ala.*, 829 F.2d 1056, 1059 (11th Cir. 1987); *see also Restatement (Second) of Judgments* § 27, cmt. d.

An issue is "actually litigated" when it "is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined." *Id.* "An issue may be submitted and determined on a motion to dismiss for failure to state a claim, a motion for judgment on the pleadings, a motion for directed verdict, or their equivalents, as well as on a judgment entered on a verdict." *Id.*

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[3] also referred to as collateral estoppel or estoppel by judgment.

In Beck's state court case, the issue of whether Beck had standing to assert RICO claims was presented on a motion to dismiss and determined by the Dade Circuit Judge in a written order dated November 29, 1989. Accordingly, the RICO standing issue now before the court already has been "actually litigated" for purposes of issue preclusion.

The court concedes that discarding the state court opinion and deciding the standing issue again arguably would allow Beck to secure a second opportunity to relitigate an issue that already has been pressed to a clear decision by a state court. *See* 18 *Wright, Miller & Cooper, Federal Practice and Procedure* § 4434 (1981).

Nevertheless, where the full faith and credit statute applies, as it does here, a federal court may not give a state court judgment greater issue preclusive effect than would the courts of the judgment rendering state. *Gjellum v. City of Birmingham, Ala.*, 829 F.2d 1056, 1059 (11th Cir. 1987). A Florida court would not give issue preclusive effect to the Dade Circuit Court's determination of Beck's standing to bring RICO claims because, as set forth previously, no final, appealable judgment was reached in the Dade Circuit Court case. *See Mobile Oil Corporation v. Shevin*, 354 So.2d 372, 374 (Fla. 1977) (holding that the essential elements of the doctrine as framed by Florida courts require that "the parties and issues be identical and that the particular matter be fully litigated and determined in a contest that results in a final decision of a court of competent jurisdiction."); *Weigh Less for Life v. Barnett Bank of Orange Park*, 399 So.2d 88, 90 (1st DCA 1981) ("The order granting the motion to dissolve the prejudgment writ did not finally dispose of the case, and

therefore cannot provide the foundation for a claim of [issue preclusion]."); *see also In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F.2d 213, 218-221 (8th Cir. 1977); *Kaspar Wire Works, Inc. v. Leco Engineering & Machinery, Inc.*, 575 F.2d 530, 538 n. 11 (5th Cir. 1978); 18 *Wright, Miller & Cooper, Federal Practice and Procedure* § 4434 (1981) ("A very special problem is presented when pretrial rulings that might have been suitable for preclusion before final judgment are followed by events that forestall any judgment or appeal.").[4]

Because neither claim nor issue preclusion applies here, the court must now decide the RICO standing issue again.

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[4] Having concluded that no final judgment was entered in the prior state court action, the court does not reach two difficult issues. First, whether Beck's state court complaint and his crossclaim share an "identity of the facts essential to the maintenance of the action[s]." *See Husky Industries, Inc. v. Griffith*, 422 So.2d 996, 999 (5th D.C.A. 1982). If so, the identity of cause of action element of claim preclusion under Florida law would be satisfied, which would appear to give rise to claim preclusion. *See id.* If not, then a second issue arises: whether the Dade Circuit Court's determination of the issue of Beck's standing under Florida's civil RICO provisions precludes the relitigation of Beck's standing under the federal RICO provisions. Florida's Rico provisions are patterned after federal Rico provisions. *See generally* Jennifer Daley, "Tightening the net of Florida's Rico Act," 21 Fla. St. U. L. Rev. 381 (Fall, 1993). Because no final judgment was entered in the prior state court action, however, the court reaches neither of these issues.

D. BECK'S STANDING UNDER RICO

The civil provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c), provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therfor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorney's fee." Thus, in order to have standing to sue for damages on a civil RICO claim, a plaintiff must show (1) that he was injured in his business or property, (2) that section 1962 was violated, and (3) that the plaintiff was injured "by reason of" the section 1962 violation. *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir. 1994); *O'Malley v. O'Neill*, 887 F.2d 1557, 1561 (11th Cir. 1989).

A standing analysis is employed to refuse to determine the merits of a legal claim on the grounds that, even though the claim may be correct, the litigant advancing it is not properly situated to be entitled to its judicial determination. *See* 13 *Wright, Miller & Cooper, Federal Practice and Procedure* § 3531 (1984). The focus in a standing analysis is on the party, not the claim itself. *Id.*

When an attack on standing occurs via a motion for summary judgment, the plaintiff "must set forth by affidavit or other evidence specific facts . . . which for purposes of the summary judgment motion will be taken to be true." *Jacobs v. Florida Bar*, 50 F.3d 901 (11th Cir. 1995); Rule 56(e), Federal Rules of Civil Procedure.

The court assumes without deciding that the injuries Beck asserts in his crossclaim – loss of an unsecured loan

to SIG, loss of employment, guaranty of a loan, loss of the value of his stock in SIG, attorneys' fees and costs incurred in a suit on a guaranty – are injuries to business or property. The court further assumes that the pattern of racketeering activity Beck sets forth constitutes a violation of section 1962 – either the substantive provisions or the conspiracy provision.[5] The court focuses its analysis on the third element: whether the plaintiff was injured "by reason of" the section 1962 violation.[6]

It may well be true that the violations of section 1962 Beck alleges constituted the "but for" cause of the injuries Beck sustained. *See Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1317 (1992); *O'Malley v. O'Neill*, 887 F.2d 1557, 1561 (11th Cir. 1989). But, despite the broad language of section 1964, RICO does not provide a remedy for every injury that may be traced to predicate acts. *Id.* "It is well-established that RICO plaintiffs must prove proximate causation in order to recover." *Holmes*, 112 S. Ct. 1317-18; *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991). In other words, causation principles generally applicable to tort liability must be considered applicable

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[5] Section 1962(a), (b) and (c) set forth substantive RICO crimes. Section 1962(d) makes it a crime to conspire to violate sections 1962(a), (b), or (c).

[6] The Dade Circuit court's decision turned on whether there was a RICO violation, apparently finding that Beck met the injury and causation requirements. The Dade court found that Beck adequately alleged a RICO conspiracy claim, but did not adequately allege substantive RICO claims. By contrast, the Court here assumes without deciding that Beck met the injury requirement and that the defendants violated section 1962 under either the substantive or conspiracy provisions and bases its holding on the causation element of section 1964.

in RICO cases. *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994). In the 11th Circuit, a plaintiff has standing to sue under section 1964(c) only if his injury flowed *directly* from the commission of the predicate acts. *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991).

In *Pelletier*, the 11th Circuit stated that

> [t]here is some question whether this proximate cause requirement limits damages recoverable to those caused directly by the predicate act (e.g., by reliance on fraudulent misrepresentations) or to those caused indirectly by the predicate act (e.g., by purchasing property at a price that has been artificially inflated by a scheme to defraud). We have taken the more restrictive view, holding that a plaintiff has standing to sue under section 1964(c) only if his injury flowed *directly* from the commission of the predicate acts. This means that, when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme.

Id. at 1499-1500 (citations omitted) (emphasis added).[7]

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[7] Though *Pelletier* preceded *Holmes*, the Supreme Court in *Holmes* did not overturn or limit *Pelletier*. To the contrary, the Court explicitly left standing *Pelletier*. *See Holmes*, 112 S. Ct. at 1320 n. 20 ("[O]ur use of the term "direct" should merely be understood as a reference to the proximate-cause enquiry [sic] that is informed by concerns set out in the text. We do not necessarily use it in the same sense as courts before us have, and intimate no opinion on results they reached. See, e.g., . . . *Pelletier*, 921 F.2d at 1499-1500. . . . "). Thus, though at least one other circuit has criticized as overly restrictive the 11th Circuit's RICO causation standard followed in *Pelletier*, *see Zervas v. Faulkner*, 861 F.2d 823, 833-34 (5th Cir. 1988) (asserting that the 11th Circuit's RICO standard denying RICO recovery if the plaintiff's injury did not flow *directly* from the predicate acts may be overly restrictive as set forth in *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987)), the 11th Circuit's RICO causation standard as set forth in *Pelletier* remains binding precedent in this circuit.

Thus, to have standing in this case, Beck must set forth facts through affidavits or other evidence that, if taken as true, show an injury to him that flowed directly from the defendants' fraudulent scheme. *See Pelletier v. Zweifel*, 921 F.2d at 1499. Because the predicate acts Beck alleges are mail fraud, Beck must show both that he was a target of the scheme to defraud *and* that he relied to his detriment on misrepresentations made in furtherance of that scheme. *See Id.* at 1499-1500.

Beck lists approximately 50 predicate acts in his RICO case statement. *See* Plaintiff's response to RICO case standing order (DE 25). But in his statement of material facts submitted in opposition to the Belleza Group's summary judgment motion, Beck concedes that he was not injured directly from many of these predicate acts. *See* Plaintiff's statement of material facts in opposition to the New Jersey Group's motion for summary judgment at 5 (DE 163). Instead, Beck sets forth four predicate acts he alleges were committed directly against him:

> 1. The defendants' fraudulent inducement of Beck to extend a $150,000 loan to the defendants' enterprise.

2. The defendants' fraudulent inducement of Beck to personally guaranty a $7.5 million loan to the defendants' enterprise.

3. The defendants' fraudulent inducement of Beck to purchase stock in the defendants' enterprise and fraudulently causing him to fail to sell his stock until it was too late; and

4. The defendants' fraudulent creation of causes for Beck's termination due to his threat to their continued racketeering conduct.

Id. at 5-6.

Having considered this list of predicate acts from which Beck claims he was directly injured, it is clear that Beck brings suit in several capacities. First, Beck sues as a creditor of SIG based on SIG's failure to pay back a $150,000 loan he made to SIG and. Second, Beck sues as a guarantor based on his personal guarantee of the $7.5 million loan First Fidelity made to SIG. Beck became personally liable for this loan when SIG defaulted on it. Third, Beck sues as a stockholder alleging that he bought SIG stock, and failed to sell it until it had dropped in value. Fourth, Beck sues as an employee. Beck claims he was terminated as a result of his threat to the continued racketeering conduct. Bearing in mind that a standing analysis focuses on the party, not the claim, *see* 13 *Wright, Miller & Cooper, Federal Practice and Procedure* § 3531 (1984), the essential question thus is whether a creditor, a guarantor, a stockholder, or an employee has standing to sue under RICO. To proceed to trial, Beck must show that he has standing to sue in one or more of these capacities.

1. BECK'S STANDING AS A CREDITOR AND GUARANTOR.

Beck alleges that he has standing because he was fraudulently induced to make a $150,000 unsecured loan to SIG. Because SIG has failed to pay its loan back to Beck, Beck is a creditor of SIG. Beck also claims he has standing as a guarantor. But guarantors are "contingent creditors." *Mid-State Fertilizer v. Exchange National Bank*, 877 F.2d 1333, 1336 (7th Cir. 1989). "If the firm stiffs a creditor, that creditor can collect from the guarantor; the guarantor succeeds to the original creditor's claim against the firm." *Id.* Beck thus is properly characterized as a creditor for both of these claims.

"Creditors of a bankrupt corporation, however, generally do not have standing under RICO." *Manson v. Stacescu*, 11 F.3d 1127, 1130 (2nd Cir. 1993) (citing *Mid-State fertilizer*, 877 F.2d at 1336-37)). The creditor generally sustains injury only because he has a claim against the corporation. The creditor's injury is derivative of that of the corporation and is not caused proximately by the RICO violations. 11 F.3d at 1130; 877 F.2d at 1336-37.

Beck alleges that he was directly injured because he was fraudulently induced to extend the $150,000 loan by being "told both orally and in writing, through the mails, that he would continue to be the Chief Executive Officer of SIG after the [stock] offering and, as such, be in charge of the company." *Id.* at 7. Beck asserts that "[b]elieving these representations, Beck extended a $150,000 unsecured loan to SIG and invested an additional $75,000 (to purchase SIG stock)." But the only evidence Beck offers to support the broad assertion that he was told he would be CEO is a

statement in a Private Placement Memorandum offering for sale stock in SIG describing Beck as president and chief executive officer of SIG. Private Placement Memorandum (plaintiff's exhibit 11) at 42. It states that "Robert A. Beck has served as President and as a director of the issuer since September 1983[,] and that Mr. Beck is also currently Chief Executive Officer. . . . " *Id.* The memorandum nowhere tells or promises Beck that he will continue as CEO and SIG; it merely lists him currently as CEO. Beck offers no other written evidence that he was told that he would continue as CEO. Moreover, Beck offers no evidence at all – through affidavit, deposition transcript or otherwise by himself or anyone else – that he orally was told that he would continue as CEO. His bald assertion that he was told orally and in writing that he would continue as CEO is insufficient to withstand a standing challenge on summary judgment. *See Jacobs v. Florida Bar,* 50 F.3d 901 (11th Cir. 1995).

Besides the promise that he would be CEO, Beck's only other allegation that he was directly injured by extending the $150,000 loan was because "the defendants fraudulently hid from Beck some of the illegal manner in which they were already operating their Enterprise." *See* Beck's statement of material facts at 8. Beck further alleges that "[s]pecifically, the [Belleza Group] and other defendants fraudulently hid from Beck fraudulent representations they had made to indemnify contractors in order to enable these contractors in which they had an interest to get bonds." *Id.* Beck concludes that "[h]ad Beck known of these fraudulent promises to indemnify, he would not have extended the $150,000 loan nor invested the additional $75,000 in SIG. *Id.*

Beck supports these assertions by his own deposition testimony in which he states that, had he had information on the fraudulent representations the defendants made to indemnify contractors as officers of SIG, he would not have made or guaranteed loans. February 7, 1995 Deposition of Beck at 33. Beck states:

> I was hurt because information was withheld from me and had I had that information I could have prevented losses to myself and to others. I could have prevented the loss of signing the First Fidelity guarantee. . . . I could have prevented the loss that came about from the unsecured loan.

Id.

Although Beck alleges that defendants' acts directly injured him, Beck brings forward no facts to show a direct injury. Rather, Beck's above-quoted deposition testimony indicates that Beck's injuries were derivative to the injuries suffered by SIG. If SIG were restored, Beck would be restored because SIG then would be able to pay its debts to Beck – thereby satisfying its loan obligation to Beck – and pay its debts to others – thereby relieving Beck of his obligation to pay as guarantor SIG having defaulted on the First Fidelity loan. *See generally Manson v. Stacescu,* 11 F.3d 1127 (2nd Cir. 1993); *Mid-State Fertilizer v. Exchange National Bank,* 877 F.2d 1333, 1335-36 (7th Cir. 1989).

As such, Beck's injuries as an SIG creditor are no different than any other creditor of SIG. As a result, Beck's injuries were only indirectly caused by defendants' scheme against SIG. Indeed, any alleged racketeering acts were targeted at SIG's funds – not at Beck. For

these reasons, Beck does not have standing to sue under RICO on either his claim that he was fraudulently induced to loan $150,000 or his claim that he was fraudulently induced to guarantee a $7.5 million loan.

2. BECK'S STANDING AS A STOCKHOLDER.

Beck also alleges he has standing because he was fraudulently induced to hold his stock "until it was too late." *See* Beck's statement of material facts at 15. Beck claims he considered selling his stock in 1987. He claims, however, that "because of the fraudulent financial statements, the fraudulent inducement of the illegal manner in which the [defendants] were operating SIG and the fraudulent misrepresentation about the plans to terminate Beck, Beck did not sell the stock." *Id.* at 16. Beck thus alleges that information was fraudulently concealed from him, and that, for this reason, he failed to sell his SIG stock. The fact that he considered selling his stock even though he was being fraudulently induced to keep it points out how speculative Beck's claim is regarding his failure to sell his stock.

In any event, the Third Circuit recently concluded that "[f]ederal courts that have considered the question in shareholder suits *all* have held that shareholders lack standing to assert RICO claims where their injuries are not direct and distinct from any injury sustained by the corporation and shareholders generally." *In re Sunrise Litigation*, 916 F.2d 874, 881 (3rd Cir. 1990) (emphasis added) (cases cited at note 7); *see also Adams-Lundy v. Association of Professional Flight Attendants*, 844 F.2d 245, 250 (5th Cir. 1988); *Rand v. Anaconda-Ericsson, Inc.*, 794

F.2d 843, 849 (2d Cir. 1986). A RICO action to recover for injury to the corporation "is a corporate asset, and shareholders cannot bring it in their own names without impairing the rights of prior claimants in such assets." *Id.* As a result, shareholders cannot sue under RICO in their own name for diminution in the value of their stock; a decrease in stock value does not provide sufficient direct injury for the stockholder to sue in his own right. *Id.*

Beck alleges that he was fraudulently induced not to sell his stock by the defendants failing to disclose the alleged illegal activity that was occurring. But Beck fails to allege (nor does he bring forward testimony or affidavits supporting an assertion) that he was positioned differently than any other stockholder or that any other stockholder was not fraudulently induced to keep his stock. Beck fails to offer facts that any other SIG stockholder did not also sustain losses in the value of their shares. *See Manson v. Stacescu*, 11 F.3d 1127, 1131 (2nd Cir. 1993).

Even though other shareholders are alleged to have participated in the wrongdoing, those shareholders and Beck sustained the same injury with respect to the value of their SIG shares and all shareholders would be made whole by a shareholder derivation action. *See id.* The facts in this case show that Beck's injury as a stockholder was caused by the demise of SIG. Defendants' conduct was targeted at SIG, not at Beck and Beck's harm as a stockholder was only derivative in nature. Because Beck fails to bring forward facts of any direct injury to him as a stockholder, i.e., harm separate and distinct from the injury to SIG and other stockholders, Beck does not have

standing to sue under RICO in the capacity of a stockholder.

3. BECK'S STANDING AS A FIRED CEO.

Employees of companies looted by alleged RICO schemes frequently have been precluded from bringing a civil RICO action because their injuries were not proximately caused by the alleged misconduct. *See Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987); *O'Malley v. O'Neill*, 887 F.2d 1557, 1563 (11th Cir. 1989); *see also Cullom v. Hibernia National Bank*, 859 F.2d 1211, 1213 (5th Cir. 1988); *Willis v. Lipton*, 947 F.2d 998, 1000 (1st Cir. 1991). This is true when the employee was discharged in retaliation for reporting a RICO mail fraud scheme, *see Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), or for refusing to participate in the scheme. *O'Malley v. O'Neill*, 887 F.2d 1557, 1563 (11th Cir. 1989).

Beck alleges that the defendants fraudulently created causes for Beck's termination because of his threat to their continuing racketeering activity. *See* Plaintiff's statement of material facts in opposition to the New Jersey Group's motion for summary judgment 5-6. There is no basis on which to distinguish this case from *Morast* and *O'Malley;* the decision to fire Beck was tangentially related to any RICO violations that may have occurred.

4. CONCLUSION

Beck's case is similar to other cases in which an individual who is simultaneously an employee, stockholder, and creditor of a corporation attempts to recover

under RICO for injuries he incurred indirectly through a corporation. Though the 11th Circuit has not yet addressed one of these cases under a RICO standing analysis, *cf. Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), the 1st, 2nd, 3rd, 7th, and 9th Circuits all have concluded that such individuals lack standing to bring RICO claims. *See Bennett v. Centerpoint Bank*, 1991 U.S. App. LEXIS 32856 (1st Cir. 1991); *Manson v. Stacescu*, 11 F.3d 1127, 1131 (2nd Cir. 1993); *In re Sunrise Litigation*, 916 F.2d 874, 881 (3rd Cir. 1990); *Mid-State Fertilizer v. Exchange National Bank*, 877 F.2d 1333, 1335 (7th [sic] 1989); *Hamid v. Waterhouse*, 1995 U.S. App. LEXIS 7693 (9th Cir. 1995). In *Mid-State Fertilizer*, Judge Easterbrook stated that

> [g]ood reasons account for the enduring distinction between direct and derivative injury. When the injury is derivative, recovery by the indirectly-injured person is a form of double counting. "Corporation" is but a collective noun for real people – investors, employees, suppliers with contract rights and others. A blow that costs "the firm" $100 injures one or more of those persons. If, however, we allow the corporation to litigate in its own name and collect the sum (as we do), we must exclude attempts by the participants in the venture to recover for their individual injuries. A fire that causes $100 worth of damage to "the corporation", and therefore reduces the value of the investors' stock by $100, does not cause a total injury of $200 – the net loss is $100, and everyone is made whole by an award of that sum to the firm.

Mid-State Fertilizer, 877 F.2d at 1335-36. The Supreme Court later stated that "recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. at 1318. Judge Easterbrook also stated:

> [w]hy undertake such a heroic task when recovery by the firm handles everything automatically? – for investors, workers, lessors, and others share any recovery according to the same rules that govern all receipts. Recovery by the firm, followed by division according to entitlements, is especially important when the firm has landed in bankruptcy. Suits by shareholders, guarantors, and the like may well be efforts to divert the debtor's assets – to pay off one set of creditors [ ] while keeping the proceeds out of the hands of the firm's other creditors.

877 F.2d at 1336.

In this case, suits by the firm, i.e., SIG, against the defendants Beck names, i.e., SIG's officers and directors, have already been instituted. For example, SIG shareholders filed a derivative action in federal court in New Jersey for RICO violations. *See* Class Action and Derivative Complaint, *Insurance Consultants of America, Inc. v. Southeastern Insurance Group, Inc.*, Exhibit F, Defendants The Belleza Group's Statement of Material Facts (DE 138) ("The Class also seeks to recover derivatively with regard to ongoing corporate waste, mismanagement, fraud and related activities. The totality of actions by certain of defendants, comprising ongoing and continuous fraud

and other crimes, is a violation of federal and state Racketeer Influenced and Corrupt Organizations ("RICO") statutes, both as to shareholders and as to SIG."). Moreover, all three of SIG's wholly-owned subsidiaries were placed in receivership – two in Florida and one in New Jersey and both the Florida and New Jersey receivers filed actions against SIG's officers and directors, claiming looting and mismanagement. *See* Complaint for Damages for Mismanagement, Rescission of Voidable Transfer and Other Relief, *State of Florida, Department of Insurance as Receiver v. Leonard Belleza, et al.*, Exhibit N, Defendants The Belleza Group's Statement of Material Facts (DE 138); Complaint and Jury Demand, *Samuel F. Fortunato, in his official capacity as Rehabilitator v. Leonard Belleza*, Exhibit O, Defendants The Belleza Group's Statement of Material Facts (DE 138).

Because SIG can litigate (and already has litigated) against SIG's officers and directors in its own name, Beck's attempt to recover for his individual injuries cannot be permitted to go forward. Accordingly, the court holds that Beck lacks standing to sue under RICO because his injuries were not directly caused by the alleged racketeering acts and, it is

ORDERED AND ADJUDGED that defendants the Belleza Group's motion for summary judgment is **GRANTED.** Summary judgment having been granted on Beck's only counts the allege a federal question, and seeing that diversity is not present, the court declines to exercise supplemental jurisdiction over Beck's pendent state law claims pursuant to 28 U.S.C. § 1367(c)(3). The clerk is directed to close this case. All pending motions are denied as moot.

DONE AND ORDERED this 7 day of June, 1995.

/s/ Norman C. Roettger
NORMAN C. ROETTGER
CHIEF JUDGE

cc: counsel of record

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is

engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

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18 U.S.C. § 1964. Civil remedies

* * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in

which case the statute of limitations shall start to run on the date on which the conviction becomes final.

* * *

Supreme Court, U.S.
FILED
MAY 6 1999
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No. 98-1480

IN THE

Supreme Court of the United States

ROBERT A. BECK, II,

Petitioner,

v.

ROBERT M. PRUPIS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS LEONARD BELLEZZA, WILLIAM PAULUS, JR., HARRY OLSTEIN AND ERNEST J. SABATO

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Eleventh Circuit was correct in affirming the entry of summary judgment on a civil RICO conspiracy claim asserted under 18 U.S.C. §§ 1962(d) and 1964(c) where:

(i) plaintiff had no viable substantive claims under 18 U.S.C. §§ 1962(a)-(c);

(ii) plaintiff was not injured by any of the predicate acts of racketeering set forth in 18 U.S.C. § 1961(1); and

(iii) the purported overt act "in furtherance of" the RICO conspiracy was the termination of plaintiff's employment to avoid paying him certain contractual benefits and to retaliate against him for past whistleblowing activities.

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COUNTERSTATEMENT OF THE CASE

The decision that gives rise to the Petition, unlike all of the decisions comprising the "split in the circuits" identified by Petitioner, arises not from a Rule 12(b)(6) dismissal for failure to state a claim but from the entry of summary judgment on the basis of a full evidentiary record. Given the facts developed during discovery, Petitioner's case would not be able to withstand a summary judgment motion even in those circuits espousing the "minority" view. Thus, although a split in the circuits exists as to RICO standing for a terminated employee under 18 U.S.C. §§ 1962(d) and 1964(c), resolution of that split would not change the result here.[1]

A. Factual Background

Petitioner Robert A. Beck, II was a shareholder, director and former president of Southeastern Insurance Group, Inc. (SIG), a Florida-based insurance holding company. From 1983, when it was founded, until January 1990, when it declared bankruptcy, SIG owned insurance subsidiaries that wrote surety bonds for construction contractors. Defendants Leonard Bellezza, William Paulus, Jr., Harry Olstein and

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1. The Racketeer Influenced and Corrupt Organizations Act (RICO) authorizes private suits for treble damages by "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Section 1962 makes it unlawful for any person to use money derived from a pattern of racketeering activity to invest in an enterprise (§ 1962(a)), to acquire control of an enterprise through a pattern of racketeering activity (§ 1962(b)), to conduct an enterprise's affairs through a pattern of racketeering activity (§ 1962(c)) or to "conspire" to do any of the above (§ 1962(d)). *See* 18 U.S.C. § 1962.

Ernest J. Sabato (Respondents) were four members of SIG's Board of Directors.

In its early years, SIG was a small, thinly capitalized company that, because of its limited capital, issued bonds of only modest size to construction contractors. In August 1986, SIG raised $30 million of new capital through a private placement of stock and debenture bonds. R5-160-Exh. 11. This infusion of funds was intended to give SIG a higher capital base to enable it to issue larger bonds and, consequently, to generate higher earnings and profits. The long-term goal was to take SIG public, a strategy designed to allow SIG's original shareholders — including Beck — to sell their SIG stock as part of an initial public offering.

As SIG's president, Beck had an employment contract that permitted SIG to terminate him for an "inability or substantial failure to perform the material duties" assigned to him. R5-138-Exh. A [Exh. A thereto, ¶ 7.1(c)]. If Beck was "improperly terminated" — a phrase defined to mean terminated "for any reason other than set forth" in the contract — he had the option of selling his SIG stock back to SIG at "fair market value." *Id.*, ¶ 7.2. The apparent purpose of this provision was to ensure that Beck would reap the profits from an initial public offering even if he was no longer employed by SIG.

From 1983 through May 1988, Beck, as SIG's president, was responsible for overseeing the company's finances and operations, including "the monitoring of [its] financial performance." *Id.*, ¶ 3.1. Thus, Beck was effectively SIG's chief financial officer and was required to accurately report SIG's financial status to the Board of Directors and insurance regulators. R5-138-Exh. 4 at 86.

In the 18 months after the August 1986 private placement, management reports provided to both the Board and the Florida Department of Insurance by Beck and Ronald Prupis, SIG's CEO, indicated that the company was growing and profitable. *See generally* R5-138-Exh. C.[2]

In early 1988, because of SIG's reported success and profitability, the Board decided to assess whether SIG was ripe for an initial public offering. The Board needed complete and accurate information concerning SIG's operations and financial affairs, to be used as the basis for a Registration Statement and Prospectus if the Board decided to proceed with the public offering. Accordingly, in May 1988, the Board hired Firemark Consultants, Inc. (Firemark), an independent insurance consulting firm, to conduct an in-depth review of SIG's "operations, procedures, staff and management" in preparation for a possible initial public offering. R5-138-Exh. C.

The review was conducted, without restriction, at SIG's offices in May 1988 by Firemark's two principals, a surety claims specialist, a financial analyst and an administrative-personnel specialist. Firemark conducted one-on-one interviews of 72 SIG employees from every department, level and job function. R5-138-Exh. C.

On May 12, 1988, Firemark presented a preliminary oral report to SIG's Board of Directors, later memorialized in a written report. R5-138-Exh. C. Contrary to the

2. Beck's Petition is captioned "Robert A. Beck, II vs. Robert M. Prupis, et al." No "Robert M. Prupis" is involved in this case. Beck apparently intended to refer to defendant Ronald Prupis, who was SIG's CEO from August 1986 until his termination on May 13, 1988.

impression senior management had given the Board that SIG was well-run and profitable, Firemark reported that SIG was in organizational and financial disarray. Firemark found serious deficiencies in all phases of SIG's operations, including a detrimental "cash-flow" underwriting mentality whereby high-risk bonds were being issued and premiums being generated without regard to likely claims and losses. Firemark also found a lack of general management ability or knowledge of the insurance and surety business; a lack of budgetary controls and underwriting guidelines; a lack of formal personnel guidelines and salary administration; inexperience at all levels of staff and management; the existence of "cliques, in-circles, camps and favoritism"; and grossly inadequate claims procedures. Firemark concluded that SIG's Board had been misled by past reports:

> . . . SIG must frankly be considered a turnaround company. To refuse to acknowledge the number and gravity of problems, or to fail to understand the complexity and difficulty of establishing a profitable operation is shortsighted and dangerous. We are not faced with the task of restoring highly profitable results to an established company that has stumbled. Southeastern has yet to build an infrastructure, and in general has not established a solidly profitable business. *Any profits reported in the past are highly suspect, considering previous management's clearly demonstrated propensity to delude itself and the Board.*

R5-138-Exh. C (emphasis added).

Firemark made numerous recommendations, including the removal of SIG's entire senior management team — Beck (president), Ronald Prupis (CEO), Carl Shible (executive vice president of underwriting) and Linda Burton (senior underwriting officer). On May 13, 1988, in reliance on Firemark's recommendations, SIG's Board removed Beck and the other members of senior management.

B. Beck's RICO Conspiracy Claim

Beck filed RICO claims against SIG's officers and directors, including Respondents (collectively the SIG defendants), and against Firemark.[3] In his Complaint and RICO Case Statement, Beck alleged that the SIG defendants engaged in a pattern of racketeering activity, not against Beck himself but against third parties. Specifically, Beck alleged extortion and mail/wire fraud committed *against contractors* seeking surety bonds; "looting" *of SIG's insurance subsidiaries*; and mail/wire fraud committed *against First Fidelity Bank*, SIG's lender.

Beck admitted below that he was not entitled to damages as a direct result of these predicate acts aimed at third parties. But in claims asserted under RICO's substantive provisions, 18 U.S.C. §§ 1962(a)-(c), Beck alleged that he was injured indirectly because defendants'

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3. Beck's RICO claims were initially asserted as a crossclaim in a shareholders derivative suit filed against him and other SIG officers and directors in the United States District Court for the District of New Jersey. In March 1991, the federal district court in New Jersey severed Beck's crossclaim and transferred it to the Southern District of Florida pursuant to a forum-selection clause in his employment contract. For ease of reference, Beck's crossclaim is referred to in this brief as the "Complaint."

alleged activities "resulted in the failure of SIG" and "caused the value of Beck's stock to greatly depreciate." R5-138-Exh. B, ¶¶ 4.a.iv. & 16. He also alleged that he was "fraudulently induced" to purchase a SIG stock/debenture unit in August 1986 and to guarantee a $7.5 million loan from First Fidelity to SIG in December 1987. (Although Beck never paid money on the guaranty, he sought to recover the attorneys' fees he incurred defending First Fidelity's collection action.)

Beck also asserted a RICO conspiracy claim under 18 U.S.C. § 1962(d). He claimed that the SIG defendants conspired with Firemark to create false causes for his termination, not to further their alleged RICO enterprise but to deprive him "of the money due and owing to him under his employment contract with SIG," which required repurchase of his stock if he was fired without cause. R5-138-Exh. A at ¶¶ 13, 50, 59. Beck also claimed that defendants were motivated by a desire to retaliate against him for refusing to participate in their allegedly illegal activities and for previously blowing the whistle on defendants by reporting those activities to the Florida Department of Insurance. Beck claimed that his termination was an overt act in furtherance of the alleged RICO conspiracy. R5-138-Exh. A, ¶¶ 43-60. All of these assertions are repeated in Beck's Petition (at 3).

As is explained *infra*, such allegations cannot support a RICO conspiracy claim even under the minority view relied upon by Beck. In any event, four years of extensive discovery revealed that his claims were devoid of any factual support.

Contrary to the assertions of the Petition (at 3-4), Beck submitted no evidence to support his claim that SIG hired Firemark to fabricate criticisms of his performance or to give SIG a false excuse to terminate him. In fact, prior to transferring Beck's action to Florida, the federal district court in New Jersey dismissed the RICO claim against Firemark, finding no evidence of any conspiracy and nothing false about the Firemark report:

> It cannot be said that the [Firemark] Report itself is an objective manifestation of the [conspiracy] when Beck has failed to allege how the contents of the Report were false. Moreover, the questionable conduct described in the Report is attributed solely to neither Beck nor any other member of management. Additionally, *it is illogical for Beck to claim that the Report was false when it documents the same misconduct that Beck asserts occurred at SIG.*
>
> * * *
>
> Beck has nowhere provided any factual support for the allegation that the Report was false or that it blamed him exclusively for the misconduct at SIG. Although the Report does recommend Beck be terminated, it does not explicitly attribute any wrongdoing to Beck alone. If anything, the Report suggests that much of the management of SIG was to blame. The Report recommends termination or investigation of numerous officers or directors in addition to Beck.

R5-138-Exh. L at 44-45, 51 (emphasis added).

C. Respondents' Summary Judgment Motion

Beck did not appeal the dismissal of Firemark. Nevertheless, he pressed his claims against the SIG defendants, Firemark's alleged co-conspirators. After the close of discovery, Respondents moved for summary judgment in the United States District Court for the Southern District of Florida.

In opposing the motion, Beck submitted a lengthy statement of material facts, a brief and 55 exhibits, including documents and excerpts from deposition transcripts. Nine of those exhibits purportedly related to his claim that defendants fabricated causes for his termination. *See* R5-163 at 17-18 (citing R5-161-Exhs. 12 & 16; R5-162-Exhs. 36, 39, 42-44, 47-48). With respect to that claim, Beck contended — despite the dismissal of Firemark — that the SIG defendants' decision to retain Firemark was made at clandestine meetings and that Firemark falsely impugned Beck's managerial abilities.

The nine exhibits, however, showed that Beck's conspiracy claim was factually baseless. Five of the exhibits made no mention of Firemark at all, let alone of any secret meetings involving Respondents. Those exhibits merely consisted of hearsay statements of three SIG employees concerning rumors of Beck's possible termination and Ronald Prupis's attempt to limit Beck's power. None of those exhibits even remotely tended to prove that Respondents secretly hired Firemark to fabricate causes for Beck's termination; his citation to those exhibits was downright baffling.

Although the remaining four exhibits did refer to Firemark, they likewise failed to support Beck's conspiracy claim. Two of those exhibits consisted of double and triple hearsay statements by former Firemark employees that Firemark recommended Beck's termination because Joanne Morrissey (Firemark's president) wanted Beck's job. Quite apart from the incompetent nature of this multi-layered hearsay, even if it were true that Morrissey wanted Beck's job there was no evidence that Respondents knew of her career ambitions. Moreover, such a motive has absolutely nothing to do with alleged RICO predicate acts or the claimed RICO conspiracy.

The final two exhibits relied upon by Beck in support of his conspiracy claim consisted of deposition testimony of a SIG employee and of Michael Morrissey, another Firemark principal. Their testimony merely concerned the consulting work Joanne Morrissey performed at SIG after Beck and the other senior managers were terminated. It did not support Beck's claim that Respondents conspired with Firemark to fabricate reasons for his termination.

The district court granted Respondents' summary judgment motion in all respects. App. 23.

D. The Eleventh Circuit Decision

The United States Court of Appeals for the Eleventh Circuit affirmed the dismissal of Beck's RICO claims but vacated the dismissal of his common law fraud and negligence claims and remanded for further consideration. *Beck v. Prupis*, 162 F.3d 1090 (11th Cir. 1998). Beck seeks review only of that portion of the Eleventh Circuit's decision that affirmed summary judgment on his § 1962(d) conspiracy

claim. Indeed, Beck's Petition glosses over the fact that he alleged violations of RICO's substantive provisions based upon his status as shareholder, creditor and guarantor.

The Eleventh Circuit first addressed Beck's substantive claims under 18 U.S.C. §§ 1962(a)-(c). To the extent Beck alleged that defendants' conduct "led to SIG's demise, which in turn caused Beck's losses," these claims were "derivative" and thus "clearly barred by the proximate cause requirement [because] the detrimental effects of racketeering activity directed toward a third party (in this case, SIG) are not actionable under RICO." *Id.* at 1097 n.12 (App. 12) (citations omitted). The court also rejected Beck's claims that defendants "fraudulently induced" him to become a shareholder, creditor and guarantor, finding that Beck did not reasonably rely upon any misstatements and that defendants did not possess any fraudulent intent toward him. *Id.* at 1096-98 (App. 9-14). Thus, Beck had no viable substantive RICO claims.

Next, the Eleventh Circuit affirmed summary judgment on Beck's conspiracy claim under 18 U.S.C. § 1962(d), holding that terminated whistleblowers lack standing to pursue RICO conspiracy claims because their injuries are not proximately caused by predicate acts of racketeering. *Beck*, 162 F.3d at 1098-99 (App.14-18). The court reasoned that the predicate act injury requirement that applies to RICO's substantive provisions "applies equally well to RICO's conspiracy provisions." *Beck*, 162 F.3d at 1098 (App. 15). *See Holmes v. Security Inv. Protection Corp.*, 503 U.S. 258, 265-69 (1992); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497 (1985). "RICO was enacted with an express target — racketeering activity — and only those injuries that are proximately caused by racketeering activity should be actionable under the statute." *Beck*, 162 F.3d at 1098 (App. 15-16).

The Eleventh Circuit also concluded that the minority view would eviscerate the standing limitations of §§ 1962(a)-(c). "[R]equiring proof of direct injury by racketeering activity for section 1962(a)-(c), but not for section 1962(d), would (in addition to being logically inconsistent), allow plaintiffs to circumvent the requirements of the first three subsections simply by alleging a conspiracy." *Beck*, 162 F.3d at 1099 (App. 16-17), *citing Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir. 1993) ("the artful pleader . . . could circumvent the predicate act requirement applicable to suits based on § 1962(a)-(c) simply by alleging a conspiracy to commit those same substantive acts").

Finally, the Eleventh Circuit rejected Beck's argument that the majority view — which requires a RICO conspiracy plaintiff to prove injury resulting from a racketeering act — would render § 1962(d) superfluous. *Beck*, 162 F.3d at 1099 (App. 16-17). Under the majority view, the conspiracy provision still serves an independent and valuable function: it "allows persons who are responsible for an injury, but did not actually participate in the injury-causing activity, to be held liable." *Id.* at 1099. In other words, RICO's civil conspiracy provision establishes a procedural mechanism for holding all conspirators vicariously liable for the predicate acts committed by one of them. *Id.* at 1099 n.18 (whereas criminal conspiracy law is intended "to punish the act of the agreement itself," civil conspiracy law is intended to "impute liability" to other members of the conspiracy for the acts of the actual tortfeasor).

REASONS FOR DENYING THE WRIT

THIS CASE PRESENTS AN INAPPROPRIATE SETTING TO RESOLVE THE SPLIT IN THE CIRCUITS BECAUSE BECK'S WHISTLEBLOWER TERMINATION CLAIM IS FACTUALLY WITHOUT MERIT EVEN UNDER THE MINORITY VIEW, AND THEREFORE RESOLUTION OF THE SPLIT WOULD NOT CHANGE THE RESULT HERE.

Beck has identified a "split in the circuits" on the issue of whether a terminated employee has standing to assert a RICO conspiracy claim. The majority view holds that a terminated employee lacks such standing because the overt act in furtherance of the conspiracy — termination of employment — is not a predicate act of racketeering. The minority view holds that, in certain circumstances, a terminated employee can have such standing even though the overt act is not a predicate act of racketeering.

Although Beck argues that he would have standing to assert his RICO conspiracy claim under the minority view, he ultimately would have to face the same summary judgment motion brought here — one that required him to provide factual support for his claim that Respondents conspired with Firemark to fabricate causes for his termination. Under any view, Beck's conspiracy claim would be doomed by his inability to provide the requisite factual support.

The alleged conspiracy between Respondents and Firemark was the crux of Beck's § 1962(d) claim. Yet despite four years of discovery, Beck submitted no evidence that Respondents conspired with Firemark to fabricate

causes for his termination. As the New Jersey district court explained, there was no evidence that Firemark conspired with anyone, and it was "illogical for Beck to claim that the [Firemark] Report was false when it document[ed] the same misconduct that Beck assert[ed] occurred at SIG." Indeed, it would have been counterproductive for Respondents to hire Firemark to fabricate corporate wrongdoing when their purpose was to compile truthful information to be relied upon by prospective investors in connection with the planned public offering.

Nor could Beck substantiate his claim that Respondents harbored a retaliatory motive in terminating him. The nine exhibits Beck proffered in support of his retaliation claim were factually irrelevant and legally incompetent. The competent evidence adduced below showed that SIG's Board terminated Beck in reliance upon an extensive operational review conducted by Firemark, an independent consulting firm whose dismissal from this case Beck did not appeal. Significantly, the Firemark report did not blame Beck alone for the misconduct at SIG. Far from demonstrating a retaliatory motive against Beck, the report attributed blame to, and recommended termination of, SIG's entire senior management team.

None of the minority cases involved a situation like this, where the plaintiff had an opportunity to support his allegations with facts after extensive discovery but failed to do so. Indeed, prior to this case, all of the decisions comprising the split in the circuits arose on motions to dismiss pursuant to Rule 12(b)(6).[4] Given Beck's inability

4. The majority view is expressed in *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 43 (1st Cir. 1991); *Hecht v. Commerce Clearing*

(Cont'd)

to muster any facts to support his claim of retaliatory discharge, the minority view of RICO conspiracy standing cannot help him.

The lack of factual support for Beck's claims also means that he cannot satisfy RICO's proximate cause requirement as construed by the minority courts. RICO authorizes civil suits by "[a]ny person injured in his business or property *by reason of* a violation of section 1962." 18 U.S.C. § 1964(c) (emphasis added). Section 1964(c) requires any RICO plaintiff to prove that the RICO violation was the proximate cause of his injury, not merely the "but for" or "factual" cause. *Holmes*, 503 U.S. at 266-68. In the context of RICO conspiracy claims, the minority courts explain that, to satisfy the proximate cause requirement, the plaintiff must prove that he was injured "by reason of" an "overt act in furtherance of" the conspiracy. *Schiffels*, 978 F.2d at 348-50; *see Khurana*, 130 F.3d at 153-54; *Shearin*, 885 F.2d at 1167, 1169. Beck, however, cannot prove that he was injured "by reason of" an "overt act in furtherance of" the conspiracy.

First, given Beck's failure to provide evidentiary support for his retaliatory discharge claim, his discharge

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(Cont'd)

House, 897 F.2d 21, 22 (2d Cir. 1990); *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 384 (8th Cir. 1993), *cert. denied*, 508 U.S. 957 (1993); and *Reddy v. Litton Industries*, 912 F.2d 291, 293 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991). The minority view is expressed in *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1164 n.1 (3d Cir. 1989); *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 146 (5th Cir. 1997), *cert. granted, judgment vacated as moot*, 119 S. Ct. 442 (1998); and *Schiffels v. Kemper Fin. Services, Inc.*, 978 F.2d 344, 346, 353 (7th Cir. 1992).

was not wrongful and thus was not an "overt act" capable of sustaining his civil conspiracy claim. Only wrongful or tortious overt acts can support civil conspiracy liability. *See* W. Page Keeton, *Prosser & Keeton on the Law of Torts*, § 46 at 324 (5th ed. 1984) (to hold defendants liable for civil conspiracy, "some act must be committed by one of the parties in pursuance of the agreement, *which is itself a tort*") (emphasis added); *Flinders v. Datasec Corp*, 742 F. Supp. 929, 934-35 n.8 (E.D. Va. 1990) (under minority view, overt act supporting civil RICO conspiracy claim must be "wrongful" or "tortious" since "recovery in tort is limited to injuries arising from unlawful acts").

Second, even assuming Beck could prove that he was the victim of a retaliatory discharge, he still could not prove that the discharge was "in furtherance of" the RICO conspiracy — a requirement of proximate cause. *See Schiffels*, 978 F.2d at 350; *Khurana*, 130 F.3d at 153-54. Even courts in the minority agree that employment termination is not "in furtherance of" a RICO conspiracy if the termination occurs after the employee has already exposed the fraudulent scheme and the termination is simply to punish or retaliate against him for blowing the whistle. For example, in *Schiffels*, the Seventh Circuit found a RICO conspiracy claim deficient because plaintiff's allegations indicated "only that she was fired in retaliation for attempting to disclose the fraudulent scheme, not to further it or prevent its disclosure." 978 F.2d at 350-51, 353. Similarly, a district court in the Third Circuit — another minority jurisdiction, *see Shearin*, 885 F.2d at 1168-69 — dismissed a RICO conspiracy claim because plaintiff's termination "would not prevent her from disclosing the alleged illegalities." *Casper v. Paine Webber Group, Inc.*, 787 F. Supp. 1480, 1499-1500 (D. N.J. 1992).

Here, Beck asserted that the SIG defendants (1) retained Firemark to "provide the directors an excuse to terminate Beck's employment without having to repurchase Beck's stock" pursuant to his employment contract, and (2) terminated him for "his refusal to participate in and his blowing the whistle on the defendant directors' RICO conspiracy." Petition at 3. Even assuming that those assertions could be supported factually, such conduct would not be "in furtherance of" a RICO conspiracy.

The first assertion merely relates to an alleged breach of Beck's employment contract. If Respondents' motive in firing Beck "for cause" was to avoid the stock repurchase obligation, the firing would not advance the alleged conspiracy to defraud contractors or to loot SIG's insurance subsidiaries. At best, it might give Beck a common law claim for breach of contract.

The second assertion also provides no support for Beck's conspiracy claim. Beck testified that he blew the whistle on the alleged conspiracy in early May 1988 when he advised the Florida Department of Insurance of defendants' alleged wrongdoing.[5] Because Beck had *already exposed* the alleged RICO conspiracy to the insurance regulators, his subsequent termination cannot be considered "in furtherance of" that conspiracy, even under the minority view. *See Schiffels*, 978 F.2d at 350-51, 353; *Casper*, 787 F. Supp. at 1499-1500; *see also United States v. Steele*, 685 F.2d 793, 801 (3rd Cir. 1982) (acts occurring

5. Under Florida law, the insurance regulators were obligated to investigate allegations of wrongdoing and had broad investigative powers. Fla. Stat. §§ 624.307 & 624.321; *Florida Dep't of Ins. and Treasurer v. Bankers Ins. Co.*, 694 So. 2d 70, 71-74 (Fla. App. 1997).

after criminal bribery scheme was revealed to Governor of Puerto Rico were not committed "in furtherance of" the conspiracy); *cf. United States v. Maze*, 414 U.S. 395, 401-03 (1974) (under mail fraud statute, there was insufficient connection between mailings and execution of respondent's scheme where mailings "increased the probability that respondent would be detected and apprehended").

Indeed, even after the termination, nothing prevented Beck from further exposing the alleged fraud by continuing his conversations with the insurance regulators or, in his capacity as a substantial SIG shareholder, calling a shareholders' meeting and demanding an investigation. *See Casper*, 787 F. Supp. at 1500 (plaintiff's termination was not in furtherance of RICO conspiracy because it "would not prevent her from disclosing the alleged illegalities, but rather invites [her] to disclose the alleged unlawful schemes").

Moreover, prior to Beck's termination, Respondents' own actions resulted in the exposure of the wrongdoing at SIG. It was Respondents who hired Firemark to audit SIG's operations, and it was Firemark whose investigation revealed the conduct that Beck alleges comprised much of the RICO predicate acts. Because Respondents themselves helped to expose the wrongdoing, their subsequent termination of Beck could not have been "in furtherance of" the conspiracy; the cat was already out of the bag. *Cf. Fiswick v. United States*, 329 U.S. 211, 217 (1946) (co-conspirator's confession is not "in furtherance of" a conspiracy but rather is in frustration of it); *see also Wong Sun v. United States*, 371 U.S. 471, 490-91 (1963) (same).

In sum, even under the minority view, Beck cannot establish a RICO conspiracy claim. Because he produced no evidence to support his claim of retaliatory discharge, his termination was not a "wrongful" overt act. Moreover, because the termination occurred after Beck blew the whistle, it could not have been "in furtherance of" the alleged RICO conspiracy. Given these deficiencies, Beck cannot prove that his termination was "proximately caused" by the RICO conspiracy. *See Holmes*, 503 U.S. at 266-68; *Schiffels*, 978 F.2d at 353.

The outcome of Beck's RICO conspiracy claim would thus be the same under either the majority "predicate act" view or the minority "overt act" view. Because a grant of certiorari would not lead to a different result in this case, resolution of the split in the circuits should await another day.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

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Supreme Court, U.S.
FILED
MAY 19 1999
CLERK

(3)

No. 98-1480

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Supreme Court of the United States

ROBERT A. BECK, II,

Petitioner,

vs.

RONALD M. PRUPIS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In their Opposition Brief, Respondents, Leonard Bellezza, William Paulus, Jr., Harry Olstein and Ernest J. Sabato (the "Bellezza Group"), do not dispute that there is a sharp conflict among the circuits as to the question presented by the Petition, nor do they dispute that the question is important and ripe for resolution. The Bellezza Group instead seeks to deter resolution of this important question by re-writing, consistent with its view of the case, the factual findings made by the Eleventh Circuit, and distorting what it labels the "minority view" to argue that, even under that view, Petitioner, Robert A. Beck, II ("Beck"), would not prevail. This is simply not so.

The record on the summary judgment before, first, the United States District Court for the Southern District of Florida and then the Eleventh Circuit was substantial, consisting of hundreds of exhibits presented by both parties. The Eleventh Circuit reviewed the record, including those exhibits, and then, resolving conflicts in favor of Beck, as the non-movant, made the factual findings contained in its December 15, 1988 opinion (App. 2-4 of Petition). Beck did not alter those facts in his Petition. Instead, the Petition quoted and relied on the pertinent findings of the Eleventh Circuit. The holding challenged by Beck is premised on those findings.

The Bellezza Group ignores those findings, and cites (in many cases, inaccurately) some of the exhibits it presented, mischaracterizes some of the evidence presented by Beck, attacks other evidence as "incompetent", and avoids other substantial evidence. This Reply Brief will decline the invitation to engage in repeating the analysis

of the factual disputes made to the lower courts. The unusual situation of the respondent challenging the factual findings of the circuit court does not alter the Eleventh Circuit's opinion, which rejects these factual arguments. If this were not controlling, no petition would ever be granted, as the crucial facts could just be re-characterized by the respondents.[1]

The Bellezza Group even goes so far as to argue that this case is not appropriate to resolve the question presented because it is in the context of a summary judgment, as opposed to a motion to dismiss. This argument defies logic. This case has a fully developed summary judgment record, which the district and appellate courts reviewed, making findings which, according to the Eleventh Circuit, leave the case "hinging" on the resolution of the one question presented here. This situation actually presents an advantage over a case disposed of on a motion to dismiss, where the pleadings are taken as true, but there has been absolutely no analysis as to whether

[1] One of the findings attacked by the Bellezza Group, for example, is that the conspiracy was over prior to Beck's refusing to cooperate with and blowing the whistle on the illegal conduct. As noted, however, the illegal conduct continued for almost two years after Beck's termination, until the bankruptcy of Southeastern Insurance Group, Inc. Moreover, the fact and manner of Beck's termination were designed not only to eliminate the threat to the continued RICO conduct, but also to discredit Beck. Thus, this and the other factual attacks are misplaced: Beck's termination was an overt act in furtherance of the RICO conspiracy. As the Eleventh Circuit stated, this case "hinges" (which can only mean that it goes one way or the other) on the resolution of the question presented in Beck's Petition.

the plaintiff can present any evidence to support its claims. Beck has presented sufficient evidence to allow the Eleventh Circuit to make the findings in its opinion. If this Petition were accepted and the summary judgment reversed, all that would remain would be the trial of the case.

Next, the Bellezza Group tries to re-write what it labels the "minority view", arguing that under it, while an overt act that injures a plaintiff need not be a RICO predicate act, it still must be a "wrongful" act. Not one of the decisions from the Third, Fifth or Seventh Circuits holds this. *See Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143 (5th Cir. 1997), *cert. granted, judgment vacated as moot*, ___ U.S. ___, 119 S.Ct. 442 (1998); *Rehkop v. Berwick Healthcare Corp.*, 95 F.3d 285, 290 (3d Cir. 1996); *Gagan v. Am. Cablevision, Inc.*, 77 F.3d 951, 958-59 (7th Cir. 1996); *Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344 (7th Cir. 1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989). Rather, they hold that an employee who is terminated for refusing to participate in or for blowing the whistle on a RICO conspiracy has been injured by reason of an overt act in furtherance of the RICO conspiracy and, accordingly, may sue under Section 1962(d). *Id.* Furthermore, such a "wrongful" overt act requirement would turn traditional conspiracy law on its head. *See, e.g., Yates v. United States*, 354 U.S. 298, 334 (1957) (overt act need not be criminal in nature and is "simply to manifest 'that the conspiracy is at work' "), *rev'd on other grounds, Burks v. United States*, 437 U.S. 1 (1978); *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946) (under conspiracy provision of Sherman Antitrust Act, overt acts in furtherance of a conspiracy "may be in themselves

wholly innocent acts."). Last, regardless, Beck's termination was, in fact, "wrongful."

The Eleventh Circuit could not have been more clear in establishing the one and only controlling question presented by the Petition, in beginning its opinion as follows:

> This case **hinges** on the following question: Must a plaintiff bringing a civil RICO conspiracy claim prove that the overt act (in furtherance of the conspiracy) by which he was injured was an "act of racketeering"? (emphasis added)

The Bellezza Group's Opposition Brief tries to change this inalterable fact, but cannot. This is the appropriate case to resolve the sharp conflict between the circuits on this important question.

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DISTRICT OF NEW JERSEY
CIVIL DOCKET FOR CASE NO. 89-3389 xx AJL

DATE	NR	89-3389(XX) AJL, JR. PROCEEDINGS
8-14-89	1	Complaint with *jury demand* filed 8-10-89.
8-14-89	2	*Amended Complaint* with *jury Demand* filed 8-11-89.
8-14-89	–	Summons issued as to defts. Southeastern Insurance Group, Inc., Robert A. Beck, II, Byron L. Sparber, Esq., Lynn K. DAY, Harry Olstein, Ernest J. Sabato, Ronald M. Prupis, Linda F. Burton, Carl B. Shible (35 days) (Picked up by Messenger.)
8-14-89		Summons issued as to all other defendants (20 days) (Picked up by Messenger)
8-14-89	3	Notice of allocation & assignment filed. (Newark-Lechner)
12-1-89	4	Minutes of Proceedings of 11-29-89 fld. (LECHNER) STATUS CONF. Dispositive motions coming. To be fld. 25 business days before ret. date.
12-14-89	5	Consent Order extending time of deft. Deloitte, Haskins & Sells to answer until 1-9-90 fld. (LECHNER)n/m
12-21-89	6	Agreed Motion of deft. Robert A. Beck, II for extension of time to respond to pltfs' Amended Complt. ret. 1-22-90 w/Certificate of Service fld. 12-20-89. (No Brief)

12-26-89	7	Order granting deft. Robert A. Beck, II extension of time to answer until 1-9-90 fld. 12-22-89. (LECHNER)n/m
12-27-89	8	Consent Order extending time of deft. Paul Petigrow to answer until 1-9-90 fld. 12-22-89. (LECHNER)n/m
12-27-89	9	Consent Order extending time of deft. Neil Prupis to answer until 1-9-89 fld. 12-22-89. (LECHNER)n/m
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12-27-89	11	Consent Order extending time of deft. Stephen Lampf to answer until 1-9-90 fld. 12-22-89. (LECHNER)n/m
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5-22-90	18	Notice of motion of pltfs. to amend complt. to add additional pltfs. ret. 6-25-90; Cert. of Theodore L. Abeles and proof of svc. fld. 5-17-90. (letter brief sub.)
5-22-90	19	Order directing consideration on expedited bases [sic] of motion to amend amended complt. is denied and permitting pltfs. to file motion to amend complt. ret. 6-11-90 fld. 5-22-90. (Hedges)N/M
5-22-90	20	Order re length of pltfs' brief in response to motions to dismiss and/or summary judgment etc. fld. 5-21-90. (Hedges)N/M
5-29-90	21	Order admitting Gerald J. Houlihan, Esq., Jay Starkman, Esq., Patricia del Pino, Esq. and Miguel M. de la o, Esq. to appear pro vice on behalf of dft., Robert A. Beck, II, fld. 5-25-90. (Hedges) n/m
5-29-90	22	Certification of Miguel M. de la O for admission pro hac vice, fld. 5-25-90.
5-29-90	23	Certification of Gerald J. Houlihan for admission pro vice, fld. 5-25-90.
5-29-90	24	Certification of Jay Starkman for admission pro hac vice, fld. 5-25-90.
6-6-90	25	Crossclaim of deft. Robert A. Beck, II agsto co-defts. Ronald M. Prupis, Leonard Bellezza, William D. Lipkind, Neil L. Prupis, Ernest J. Sabato, William Paulus, Jr. Harry Olstein, Frederick C. Mezey, Byron L. Sparber and Joseph Littenberg and *Third Party Complt.* and *jury* demand fld. 5-31-90.
6-7-90	–	Summons on 3rd pty complt. as to 3rd pty defts. Robert Pershes and Firemark

		Consultants, Inc. issued. (35 days) (mailed to attorney)
6-14-90	26	Reply certification of William D. Lipkind fld. 6-8-90.
6-14-90	27	Notice of motion of deft. Deloittee [sic] Haskins & Sellsto [sic] dismiss first, second, third, fifth and sixth counts for failure to state a claim and cert. of svc. fld. 6-8-90. (Date to be set)
6-14-90	28	Notice of motion of deft. Lampf, Lipkind, Prupis & Petigrow for summary judgment fld. 6-8-90. (date to be set)
6-14-90	29	Certification of William D. Lipkind fld. 6-8-90.
6-14-90	30	Notice of motion of deft. Neil L. Prupis for summary judgment and Certification of Neil L. Prupis fld. 6-8-90. (date to be set)
6-14-90	31	Notice of motion of deft. William D. Lipkind for summary judgment and Certification of William D. Lipkind fld. 6-8-90. (date to be set)
6-14-90	32	Notice of motion of deft. Stephen E. Lampf for summary judgment and Certification of Stephen E. Lampf and cert. of svc. fld. 6-8-90. (date to be set)
6-14-90	33	Notice of motion of deft. Paul M. Petigrow for summary judgment and Certification of Paul Petigrow fld. 6-8-90 and cert. of svc. fld. 6-8-90. (date to be set)
6-14-90	34	Cert. of svc. of supplemental letter brief in opposition to pltfs'. motion for leave to amend complt. fld. 6-8-90.

6-26-90	35	Order directing amended class action and derivative complt. may be amended to include specified pltfs w/in 7 days etc. fld. 6-21-90. (Hedges)N/M
6-26-90	36	Cert. of svc. of surreply brief of deft. Lampf, Lipkind, Prupis and Petigrow fld. 6-21-90.
7-9-90	37	*Second Amended complt.* and *jury* demand fld. 6-26-90.
7-9-90	38	*Answer* of defts. Joseph S. Littenberg to crossclaim of deft. Robert A. Beck, II fld. 6-27-90.
7-9-90	39	Notice of motion of deft. Deolitte [sic] Haskins & Sells to dismiss second amended complt. ret. 8-3-90 and cert. of svc. fld. 6-29-90. (brief sub.)
7-9-90	40	Minutes of Proceedings of 6-25-90 fld. 7-3-90. (Hedges) Ct. Reporter None At call for hrg. on pltf's motion to amend complt. Court indicated motion to be decided pur. to RULE 78.
7-11-90	41	Order permitting all parties to examine certain documents; staying motion of pltfs. to disqualify Budd Larner Gross Rosenbaum Greenberg & Sade; staying pltfs' notice of deposition of Michael M. Rosenbaum and Jeffrey Bronster pending further order of court and denying application for amended order etc. fld. 7-2-90. (Hedges)N/M
7-11-90	42	Notice of motion of deft. Lampf, Lipkind, Prupis and Petigrow for summary judgment and dismissal of second amended

		complt. ret. 8-3-90 and cert. of svc. fld. 7-3-90.
7-11-90	43	Notice of motion of deft. Stephen E. Lampf for summary judgment and cert. of svc. fld. 7-2-90. (RET. 8-3-90)
7-11-90	44	Notice of motion of deft. William D. Lipkind for summary judgment and dismissing second amended complt. fld. 7-2-90. (RET. 8-3-90)
7-11-90	45	Notice of motion of deft. Neil R. Prupis for summary judgment and dismissing second amended complt. fld. 7-2-90. (RET. 8-3-90)
7-11-90	46	Notice of motion of deft. Paul M. Petigrow for summary judgment and dismissing second amended complt. fld. 7-2-90. (RET. 8-3-90)
7-11-90	47	Application and clerk's order extending time of defts. William Lipkind and Neil Prupis to answer crossclaims of co-deft. Robert Beck fld. N/M
7-13-90	48	*Answer* of deft. Neil U. [sic] Prupis to crossclaim so [sic] deft. Robert A. Beck fld 7-10-90.
7-13-90	49	*Answer* of deft. William D. Lipkind, fld 7-10-90.
7-16-90	50	Original 3rd pty summons returned w/affidavit of svc. of 3rd pty summons & complt. or deft. Robert Pershes on 6-28-90 fld. 6-12-90.
7-17-90	51	Copy of notice of motion of deft. Carl B. Shible to dismiss amended complt. fld. 7-5-90. (ret. 8-3-90)

7-17-90	52	Notice of motion and motion for withdrawal of counsel for deft. Car. [sic] B. Shible and cert. of mailing fld. 7-5-90.
7-20-90	53	Notice of motion of dfts., Bellezza, Sabato, Olstein & Paulus for an extension of time to respond to crossclaim of dft., Robert A. Beck etc. ret. 7-30-90 (on papers), fld. 7-18-90.
7-20-90	54	Affidavit of Claudia A. Costa Esq., fld. 7-18-90.
7-20-90	55	Affidavit of svc of copy of notice of motion and supporting affidavit etc., fld. 7-18-90.
8-2-90	56	Order extending time of defts. Bellezza, Sabato, Olstein and Paulus to respond to crossclaim of deft. Robert A. Beck 10 days etc. fld. 7-31-90. (Hedges)N/M
8-3-90	57	Notice of dft/3rd-pty pltf., Robert A. Beck II to take deposition of Donna H. Kane and Paul Price etc. w/cert. of svc thereto, fld.
8-9-90	58	*Transcript* of hrg. held 8-3-90 fld. 8-8-90
8-9-90	59	Application and clerk's order extending time of 3rd pty deft. Robert E. Pershes to answer 3rd pty complt. to 8-17-90 fld. N/M
8-10-90	60	Proof of process svc of third-party complt. on 3rd pty dft., Firemark Consultants, Inc. on 6-27-90, fld. 8/8/90.
8/10/89 [sic]	61	Minutes of proceedings of 8-3-90, fld. 8-3-90. (Lechner) (CR-J. Houston) Hrg. on motion of dft., Deolitte [sic] Haskins & Sells to dismiss 2nd amended

complt. Decision Reserved.
Hrg. on motion of dft., Lampf, Lipking [sic], Prupis & Petigrow for Summary judgment and dismiss 2nd amended complt. Decision Reserved.
Hrg. on motion of dft., Stephen E. Lampf for summary judgment and dism. of 2nd amended complt. Decision Reserved.
Hrg. on motion of dft., William D. Lipkind for summary judgment and dismissal of 2nd amended complt. Decision Reserved.
Hrg. on motion of dft., Neil R. Prupis for summary judgment and dismissal of 2nd amended complt. Decision Reserved.
Hrg. on motion of dft., Paul Petigrow for summary judgment and dismissal of 2nd amended complt. Decision Reserved.
Hrg. on motion of dfts., Bellezza, Sabato, Olstein & Paulus for an extension of time to respond to crossclaim of dft., Robert A. Beck etc. Decision Reserved.

8-15-90 62 Minutes of proceedings of 7-30-90, fld. (Hedges) N/M Proclamation made on deft's motion for an extension of time to respond to crossclaim of deft. Robert A. Beck, etc. Ordered Motion granted.

8-16-90 63 MINUTES OF PROCEEDINGS OF 7-23-90, fld. 7-23-90. (Hedges) (CR. none) At call for hrg. on deft's mot. to ext. time to respond to crossclaim of deft. Robert A. Beck, MOT. TO BE DECIDED PUR. TO RULE 78.

8-17-90 64 Order extending time for dfts., Bellezza, Sabato, Olstein and Paulus to respond to

crossclaim of dft., Robert A. Beck for 10 days etc., fld. 8-16-90. (Hedges) n/m

8-21-90 65 Copy of 3rd pty summons returned fld. 8-6-90.

8-22-90 66 Letter OPINION fld. 8-21-90. (Lechner)

8-22-90 67 Order dismisssing [sic] and granting certain counts of second amended complt.; directing pltf. to file amended pleading and denying remaining aspects of motions to dismiss and/or summary judgment of defts. etc. fld. 8-21-90. (Lechner)N/M

9-10-90 68 Consent order extending time of 3rd pty deft. Firemark to answer 3rd pty complt. to 9-3-90 fld. 9-7-90. (Hedges)N/M

9-12-90 69 Minutes of Proceedings of 9-6-90 fld. 9-6-90. (Lechner) Ct. Reporter Joanne Houston
Status Conference re motions to dismiss crossclaims.
SC to be set for 9-13 or 14. Counsel to call back.

9-13-90 70 Notice of deft. 3rd pty pltf. Robert A. Beck of svc. of amended complt. on 3rd pty deft. Robert Pershes fld. 9-11-90.

9-18-90 71 *Order dismissing crossclaim of deft. Joseph S. Littenberg agst. deft. Robert A. Beck, II* w/out prejudice fld. 9-12-90. (Lechner)N/M

9-20-90 72 Minutes of Proceedings of 9-17-90 fld. 9-17-90. (Lechner) Ct. Reporter Joanne Houston

		Status Conference – All ans to 3rd amended complt. all cross motions and any 3rd pty complts. to be fld. by 9-28. All rogs (50) sv 10-2 ans 11-2 Produce or identify documents by 11-2 SC set for 11-9 at 8:30AM
9-25-90	73	Order granting leave for Jeffrey P. Wasserman, Esq. and Litman, Muchnick, Wasserman & Hartman to withdraw as counsel for deft. Carl B. Shible; instructing deft. Carl B. Shible attend settlement conf. on 11-9-90 etc fld. 9-19-90. (Hedges)N/M
9-25-90	74	*Third Amended Complt.* and *jury* demand w/cert. of svc. fld. 9-14-90.
9-28-90	75	DISCOVERY and PROCEDURE ORDER NO. 1 and scheduling status conf. on 11-9-90 etc. fld. 9-26-90. (Lechner)N/M
9-28-90	76	Order re motion of pltf. to disqualify Budd Larner Gross Rosenbaum Greenberg & Sade as counsel for certain defts. fld. 9-26-90. (Hedges)N/M
9-28-90	77	*Answer* of deft. 3rd pty pltf. Joseph S. Littenberg to 3rd amended complt.; *crossclaim* agst. co-defts.; *THIRD PARTY COMPLT.* and *jury* demand fld. 9-20-90.
10-3-90	–	Summons on 3rd pty complt. as to 3rd pty defts. Richard Roe, Inc. and John Doe issued. (20 days) (mailed to attorney)
10-3-90	78	*Answer* of deft. Leonard Bellezza, Harry Olstein, William Paulus, Jr. and Ernest J. Sabato to 3rd amended complt. and crossclaims fld. 10-1-90.

10-3-90	79	*Answer* of deft. William D. Lipkind to 3rd amended complt. fld. 10-2-90.
10-3-90	80	*Answer* of deft. Neil L. Prupis to 3rd amended complt. fld. 10-2-90.
10-3-90	81	Certification of Theodore L. Abeles in support of motion to disqualify law firm for defts. Leonard Bellezza, Ernest J. Sabato, William Paulus, Jr. and Harry Olstein fld.
10-3-90	82	*Transcript* of hrg. held 9-6-90 fld. 9-28-90.
10-3-90	83	*Answer* of deft. 3rd pty. pltf. Frederick C. Mezey to 3rd amended complt.; *answer* to crossclaims; *counterclaim; crosssclaim* [sic] agst. all co-defts.; *jury* demand AND THIRD PARTY COMPLT. w/cert. of svc. attached fld. 9-28-90.
10-10-90	84	Application and clerk's order extending time of deft. William Lipkind and Neil Prupis to answer 3rd amended complt. to 10-5-90. N/M (per Judge Lechner)
10-12-90	85	*Answer* of deft. 3rd pty pltf. Joseph S. Littenberg to crossclaims of defts. Leonard Bellezza, Harry Olstein, William Paulus, Jr. and Ernest j. Sabato fld. 10-4-90.
10-12-90	86	*Answer* of deft. 3rd pty pltf. Joseph S. Littenberg to crossclaims of deft. Frederick C. Mezey fld. 10-10-90.
10-12-90	87	*Answer* of deft. 3rd pty pltf. Joseph S. Littenberg to crossclaims of deft. Neil L. Prupis fld. 10-10-90.
10-12-90	88	*Answer* of defts. Leonard Bellezza, Harry Olstein, William Paulus, Jr. and Ernest J.

Sabato to crossclaims of deft. 3rd pty pltf. Joseph Littenberg fld. 10-10-90.

10-12-90 89 *Answer* of defts. 3rd pty pltf. Joseph S. Littenberg to crossclaims of deft. William D. Lipkind fld. 10-10-90.

10-15-90 90 *Revised answer* of deft. Neil L. Prupis to 3rd amended complt. w/cer of svc. attached fld. 10-12-90.

10-15-90 91 *Revised answer* of deft. William D. Lipkind to 3rd amended complt. fld. 10-12-90.

10-16-90 92 *Transcript* of hearing held 9-17-90 fld. 10-15-90.

10-29-90 93 Affidavit of William D. Lipkind fld. 10-26-90. (brief sub.)

10-29-90 94 Affidavit of Ernest J. Sabato fld. 10-26-90.

10-29-90 95 Affidavit of William Paulus, Jr. fld. 10-26-90.

10-29-90 96 Affidavit of Harry Olstein fld. 10-26-90.

10-29-90 97 Affidavit of Leonard Bellezza fld. 10-26-90.

10-29-90 98 Affidavit of Michael M. Rosenbaum in opposition to pltfs' motion to disqualify firm of Budd Larner, et al fld. 10-26-90.

10-30-90 99 *Stipulation and Order dismissing crossclaims of deft Frederick C. Mezey against co-deft Deloitte Haskins & Sells without costs* fld. 10-24-90 (Lechner) N/M

10-31-90 100 *Stipulation and order dismissing crossclaim of deft. 3rd pty pltf. Joseph Littenberg agst. deft. Deloitte, Haskins & Sells* w/out prejudice and w/out costs fld. 10-22-90. (Lechner) N/M

10-31-90 101 Cert. of svc. of notice of motion to dismiss 3rd pty complt. as to Firemark Consultants, Inc. etc. fld. 10-25-90.

10-31-90 102 Notice of motion of deft. Firemark Consultants, Inc. to dismiss 3rd pty complt. w/prejudice and counsul [sic] fees ret. 11-19-90 and cert. of svc. fld. 10-25-90. (briefs sub.)

10-31-90 103 Notice of motion of defts. Leonard Bellezza, Ernest Sabato, William Paulus, Jr. and Harry Olstein to dismiss crossclaims of Robert A. Beck, II and for sanctions ret. 11-19-90 fld. 10-29-90. (briefs sub.)

10-31-90 104 Affidavit of Claudia A. Costa fld. 10-29-90.

10-31-90 105 Affidavit of Michael M. Rosenbaum fld. 10-29-90.

11-7-90 106 Notice of amended motion of deft. Robert Pershes to dismiss 3rd pty. complt., to stay discovery and counsel fees and cert. of svc. fld. 10-26.90. (brief sub.)

11-8-90 107 Minutes of Proceedings of 11-5-90 fld. 11-5-90. (Lechner) Ct. Reporter
Joanne Houston
Status conference
11-16 amended ans 11-23 ans to rogs
Motions ret. 11-27 @ 9:00AM

11-9-90 108 Substitution of attorney on behalf of deft. 3 pty. pltf. fld. 10-30-90.

11-9-90 109 *Stipulation and order dismissing 3rd pty complt w/*prejudice and w/out costs fld. 10-30-90. (Lechner) N/M

11-13-90	110	Notice of deft. Robert A. Beck to take deposition of Terese Westling fld. 11-8-90.
11-13-90	111	*Transcript* of hrg. held 10-31-90 fld. 11-9-90.
11-16-90	112	*Answer* of deft. William D. Lipkind to crossclaims of deft. Joseph Littenberg fld. 11-14-90.
11-16-90	113	*Answer* of deft. William D. Lipkind to crossclaims of defts. Bellezza, Olstein Paulus & Sabato fld. 11-14-90.
11-16-90	114	*Answer* of deft. William Lipkind to crossclaims of deft. Frederick Mezey fld. 11-14-90.
11-16-90	115	*Answer* of deft. Neil L. Prupis to crossclaims of deft. Joseph Littenberg fld. 11-14-90.
11-16-90	116	*Answer* of deft. Neil L. Prupis to crossclaims of deft. Frederick Mezey fld. 11-14-90.
11-16-90	117	*Answer* of deft. Neil L. Prupis to crossclaims of defts. Bellezza, Olstein Paulus & Sabato fld. 11-14-90.
11-19-90	118	Minutes of Proceedings of 11-13-90 fld. 11-13-90. (Hedges) Ct. Reporter None reported At call for hrg. on motion to disqualify counsel. Court indicated motion to be decied [sic] pur. to Rule 78.
11-20-90	119	*Amended* answer of defts. Leonard Bellezza, Harry Olstein, William Paulus, Jr. and Ernest J. Sabato to third amended complt.; *crossclaim* and *jury* demand fld. 11-16-90.

11-20-90	120	Order admitting Jane W. Moscowitz, Esq. pro hac vice on behalf of deft. Robert A. Beck, II etc. fld. 11-16-90. (Hedges)N/M
11-20-90	121	Application for admission pro hac vice of Jane W. Moscowitz, Esq. on behalf of deft. Robert A. Beck, II fld. 11-16-90.
11-20-90	122	Letter OPINION and ORDER DENYING MOTION OF PLTF. Jules Bagdan to disqualify firm of Budd Larner Gross Rosenbaum Greenberg & Sade from representing defts. Leonard Belleza, Ernest J. Sabato, William Paulus, Jr. and Hary [sic] Olstein etc. fld. 11-15-90. (Hedges)N/M
11-20-90	123	PROCEDURE ORDER NO. 2 (pltf. may move for entry of default agst. Ronald Prupis and scheduling status conf. on 11-27-90 etc.) fld. 11-16-90. (Lechner)N/M
11-27-90	124	Order admitting Jame [sic] W. Moscowitz, Esq. pro hac vice on behalf of deft. Robert A. Beck, II etc fld. 11-21-90. (Hedges)N/M
11-28-90	125	Notice of appearance on behalf of defts. William Lipkind and Neil Prupis fld. 11-27-90.
12-3-90	126	Minutes of Proceedings of 11-26-90 fld. 11-26-90. (Hedges) Ct. Reporter – None Reported At call for hrg. on motion to admit pro hac vice. Court indicated motion to be decided pur. to Rule 78.
12-4-90	127	Notice of motion of pltf. to appeal the Opinion and Order of Mag. Hedges of 11-15-90, denying motion to disqualify

the law firm of Budd, Larner, Gross, Rosenbaum, Greenberg & Sade from acting as counsel for director-officer dfts., Bellezza, Paulus Olstein and Sabato, fld. 11-29-90. (Brief sub.) (No ret. date per Ellen Smith)

12-4-90 128 Certification of Theodore L. Abeles on motion to appeal order of Magistrate Ronald J. Hedges, denying motion to disqualify Budd Larner, Gross, Rosenbaum, Greenberg & Sade, fld. 11-29-90.

12-4-90 129 Certification of Theodore L. Abeles in support of motion to disqualify the law firm of Budd, Larner, Gross, Rosenbaum, Greenberg and Sase [sic] as counsel for dfts. Leonard Bellezza, Ernest J. Sabato, William Paulus, Jr. and Harry Olstein, fld. 11-29-90.

12-4-90 130 Cert. of svc. of copy of substitution of attorney fld. 11-27-90.

12-4-90 131 Order substituting attorney on behalf of deft. Joseph S. Littenberg fld. 11-27-90. (Lechner)N/M

12-4-90 132 Order re depositions noticed by Robert A. Beck, II etc. fld 11-28-90. (Hedges)N/M

12-6-90 133 Notice of motion of pltfs. for order declaring court's order of 8-21-90 a final judgment or in the alternative certify order as an interlocutory decision; Affidavit of Michael M. Rosenbaum and cert. of svc. fld. 12-4-90. (briefs sub.)

12-6-90 134 Certification of Theodore Abeles in support of pltfs' motion to certify order of 8-21-90 as final fld. 12-4-90.

12-10-90 135 *Answer* of deft. Robert A. Beck, II to 3rd amended complt. fld. 12-5-90.

12-12-90 136 Notice of deft. Robert A. Beck, II to take deposition of Donald Bailey fld. 12-3-90.

12-18-90 137 Order directing pur. to Standing Order dated 11-29-90 action is temporarily transferred to Judge Wolin for hrg. and disposition of (3) motions to dismiss, (1) motion to amend 3rd pty complt. and (1) motion to certify Court's 8-21-90 order as final or in the alternative an interlocutory decision fld. 12-14-90. (Debevoise)N/M

12-18-90 138 Order directing pur. to Standing Order dated 11-29-90 action is temporarily transferred to Judge Sarokin for hrg. and disposition of motion to disqualify counsel ret. 1-14-91 fld. 12-14-90. (Debevoise)N/M

12-19-90 139 Notice of motion of deft. Robert A. Beck, II to amend crossclaim and 3rd pty complt. ret. 1-14-91 and cert. of svc. fld. 12-17-90. (letter brief sub.)

12-19-90 140 AMENDED PROCEDURAL ORDER NO. 3 – denying rquest [sic] of Budd Larner to serve further interrogatories on deft. Beck; staying al [sic] depositions pending further order of Court and scheduling next status conf. on 1-28-90 etc. fld. 12-14-90. (Hedges)N/M

12-20-90 141 Order directing pur. to Standing Order dated 11-29-90 action temporarily transferred to a judge is retransferred to Judge Lechner for all purposes and all motions will remain as prev. scheduled fld. 12-17-90. (Debevoise)N/M

12-26-90	142	Affidavit of William D. Lipkind in opposition to motion of dft., Robert Beck to amend crossclaim, fld.
12-26-90	143	Affidavit of Neil L. Prupis of Neil Prupis in opposition to motion of deft., Robert Beck to amend crossclaim, fld.
12-27-90	144	*Answer* of deft Ronald Prupis to 3d Amended Complaint etc. filed 12-18-90.
1-8-91	145	Affidavit of svc. of copy of brief of defts. Bellezza, Sabato, Paulus and Olstein in opposition to pltf's appeal from order of Mag. Hedges fld. 1-3-91.
1-14-91	146	Affidavits of Miguel M. DE La O & Jay Starkman in support of Beck's mot. to amend crossclaim & cert. of service fld. 1-10-91. (brief sub)
1-15-91	147	Minutes of Proceedings of 1-14-91 fld. 1-14-91. (Lechner) Ct. Reporter Joanne Houston Hrg. on appeal from Mag. Hedges ruling that Budd, Larner may remain as counsel. Ordered appeal DENIED w/out prejudice to renew upon inspection of new documents. Hrg. on motion of deft. Robert Beck to amend crossclaims and 3rd pty complt. Ordered motion granted & furhter [sic] interrogatories on amended issues.
1-18-91	148	Order substituting attorney on behalf of deft. Frederick C. Mezey fld. 1-14-91. (Lechner)N/M
1-22-91	149	Notice of motion ot [sic] compel discovery; Affidavit of David J. Novack and Affidavit of Claudia A. Costa fld. 1-18-91.

1-30-91	150	Order denying application of pltf. to disqualify Budd Larner Gross Rosenbaum Greenberg & Sade w/out prejudice etc. fld. 1-28-91. (Lechner)N/M
1-30-91	151	Case Management Order fld. 1-28-91. (Lechner)N/M
1-30-91	152	Minutes of Proceedings of 1-28-91 fld. 1-28-91. (Lechner) Ct. Reporter – Howard Rappaport Hrg. on motion of deft. Robert Pershes & Firemark COnsultants, Inc. to dismiss 3rd pty complt. Decision RESERVED. Hrg. on motion of defts. L. Bellezza, E. Sabato, W. Paulus and H. Olstein to dismiss crossclaim of Robert A. Beck, II and for sanctions. Decision RESERVED. Pltfs. motion to certify for appeal. Decision RESERVED.
2-7-91	153	*Transcript* of hrg. held 1-14-91 fld. 2-6-91.
2-7-91	154	Order directing all parties shall have until 2-18-91 to inspect documents produced fld. 2-1-91. (Hedges)N/M
2-8-91	155	*Transcript* of hearing held 1-28-91 fld.
2-11-91	156	Order denying requests of defts. William D. Lipkind and Neil L. Prupis for costs and directing deft./crosspltf. Robert A. Beck, II may amend crossclaims and 3pty complt. etc. fld. 2-6-91. (Lechner)N/M
2-13-91	157	Notice of motion of pltf. Jules Bagdan to disqualify firm of Budd, Larner, Gross, Rosenbaum, Greenberg & Sade and Jeffrey Bronster; sanctions and costs ret. 3-1-91 and proof of svc. fld. 2-8-91.

2-13-91 158 Certification of Theodore L. Abeles fld. 2-8-91. (Exhibits Volume I and II sub.)

2-15-91 159 Certification of Jeffrey A. Bronster fld. 2-14-91.

3-4-91 160 Certification of Theodore L. Abeles on turnover, sanctions and disqualification motions fld. 3-1-91.

3-4-91 161 Certification of Theodore L. Abeles on turnover and production to counsel for trustee of documents in the possession of Budd Larner Gross Rosenbaum Greenberg & Sade fld. 3-1-91.

3-4-91 162 Order directing Mr. Ron Prupis and Mr. Lynn Day or counsel appear before Mag. Hedges on 3-1-91 etc. fld. 2-26-91. (Hedges)N/M

3-11-91 163 Order directing deft. Robert A. Beck, II copy and produce all documents relating to SIG no later than 3-19-91 etc. fld. 3-7-91. (Hedges)N/M

3-11-91 164 Letter OPINION fld. 3-5-91. (Lechner)

3-11-91 165 Order directing crossclaims agst. Officer defts. are transferred to Southern Dist. of Florida for all purposes, 3rd pty. complt. agst. Pershes is transferred to Southern Dist. of Florida for all purposes and *dismissing 3rd pty. complt. agst. Firemark* w/prejudice fld. 3-5-91. (Lechner)N/M

3-11-91 166 Order directing evidentiary hrg. concerning assertion of attorney-clien [sic] privilege over certain documents by defts. Bellezza, Olstein, Paulus and Sabato shall resume on 4-18-91 etc. fld. 3-7-91. (Hedges)N/M

3-12-91 167 Amended order directing crossclaims agst. Officer defts. are transferred to Southern Dist. of Florida for all purposes, 3rd pty. complt. agst. Pershes is transferred to Southern Dist. of Florida for all purposes, *dismissing 3rd pty. complt. agst. Firemark* w/prejudice and denying motions of Officer defts. Pershes and Firemark for sanctions fld. 3-11-91. (Lechner)N/M

3-13-91 168 Affidavit of Claudia A. Costa fld. 3-12-91.

U.S. District Court
Southern District of Florida (W.Palm Beach)

CIVIL DOCKET FOR CASE #: 91-CV-8121

Proceedings include all events. APPEAL
9:91cv8121 Beck v. Prupis, et al CLOSED

3/22/91	1	ORDER of transfer from USDC District of New Jersey of cross claims and third party complaint with court file and certified copy of docket sheet. (signed by Judge Alfred J. Lechner, Jr. on 03/05/91) CCAP A-7 AEV (js) [Entry date 03/28/91] [Edit date 03/28/91]
3/22/91	–	**Enter initials of Magistrate drawn in flag field. (js) [Entry date 03/28/91]
3/22/91	2	Original file and docket sheet received from District of New Jersey (kw) [Entry date 03/29/91]
6/18/91	3	MOTION by Robert A. Beck II for Hearing, and status conference (kw) [Entry date 06/27/91]
6/24/91	4	NOTICE of Appearance of Bernard S. Mandler for Bryon L. Sparber (Not member of Bar) (jl) [Entry date 06/27/91]
6/24/91	5	NOTICE of Appearance of Bernard S. Mandler for Joseph S. Littenberg (Not a member of Bar) (jl) [Entry date 06/27/91]
6/26/91	6	NOTICE of attorney appearance for Ernest J. Sabato, William Paulus Jr., Harry Olstein, Leonard Bellezza by Harley Shepard Tropin, Kenneth R. Hartmann (kw) [Entry date 07/01/91]

7/19/91	7	MOTION by Ernest J. Sabato, William Paulus Jr., Harry Olstein, Leonard Bellezza for to appear pro hac vice (kw) [Entry date 07/22/91]
7/29/91	8	MOTION by Ernest J. Sabato, William Paulus Jr., Harry Olstein, Leonard Bellezza for Claudia A. Costa to appear pro hac vice (pace) [Entry date 08/05/91]
8/8/91	9	ORDER granting [8-1] motion for Claudia A. Costa to appear pro hac vice granting [7-1] motion for to appear pro hac vice (signed by Judge Norman C. Roettger Jr. on 8/7/91) CCAP (kw) [Entry date 08/20/91]
9/6/91	10	NOTICE to take deposition of Judy Weaver 9/16/91 at 10:00 (kw) [Entry date 09/10/91]
9/12/91	11	NOTICE to take deposition of Judy Weaver 9/19/91 at 10:00 (kw) [Entry date 09/16/91]
9/19/91	12	NOTICE of cancellation of depostition [sic] of Judy Weaver on 9/19/91 @10:00 (kw)
3/31/92	13	ORDER granting [3-1] motion for Hearing, granting [3-2] motion status conference (signed by Judge Norman C. Roettger Jr. on 3/30/92) CCAP (kw) [Entry date 04/01/92]

1/12/93	14	NOTICE of Hearing: set status conference for 1:30 2/5/93 before Judge Norman C. Roettger Jr. (kw) [Entry date 01/14/93]
1/25/93	15	MOTION by Robert A. Beck II to continue of the hearing and status conference (kw) [Entry date 01/26/93]
2/23/94	16	NOTICE of Hearing: set status conference for 2:00 3/4/94 in WPB (lh) [Entry date 02/25/94]
3/8/94	17	Minute entry for proceeding held before Judge Norman C. Roettger Jr. on 3/4/94 – Status Hearing (lh) [Entry date 03/10/94]
3/21/94	18	RICO CASE STANDING ORDER 18 U.S.C. 1961 – 1968 DIRECTING COUNSEL ON FILING REQUIREMENTS (signed by Judge Norman C. Roettger Jr. on 3/16/94) CCAP (lh) [Entry date 03/28/94]
3/29/94	19	MOTION by Robert A. Beck II to extend time (lh) [Entry date 03/31/94]
4/5/94	20	ORDER granting [19-1] motion to extend time (signed by Judge Norman C. Roettger Jr. on 4/5/94) CCAP (jl) [Entry date 04/21/94]
4/19/94	22	MOTION by Robert A. Beck II to extend time to file RICO case statement (lh) [Entry date 04/29/94]
4/22/94	21	Defendants, The New Jersey Group's SUPPLEMENT to Memorandum of law in support of their motion to dismiss (lh) [Entry date 04/28/94]

4/22/91	24	NOTICE of Scrivener's error by William Paulus Jr., Leonard Bellezza, Ernest J. Sabato (lh) [Entry date 05/05/94]
4/26/94	23	MOTION by Robert A. Beck II for clarification or, in the alternative, unopposed motion for extension of time. (lh) [Entry date 05/03/94]
4/26/94	25	Response by Robert A. Beck II to RICO case standing Order (lh) [Entry date 05/05/94]
5/6/9	26	NOTICE of absence of counsel by Joseph S. Littenberg (lh) [Entry date 05/11/94]
5/9/94	27	MOTION by Robert A. Beck II to extend time to file opposition to amended motion to dismiss (lh) [Entry date 05/11/94]
5/11/94	28	MEMORANDUM of law by Robert A. Beck II in opposition to the New Jersey Group's motion to dismiss (lh) [Entry date 05/18/94]
5/18/94	29	ORDER granting [22-1] motion to extend time to file RICO case statement (signed by Judge Norman C. Roettger Jr. on 5/16/94) CCAP (lh) [Entry date 05/23/94]
5/18/94	30	ORDER granting [27-1] motion to extend time to file opposition to amended motion to dismiss (signed by Judge Norman C. Roettger Jr. on 5/16/94) CCAP (lh) [Entry date 05/23/94]
5/18/94	31	ORDER granting [23-1] motion for clarification or, in the alternative, unopposed motion for extension of time. (signed by

		Judge Norman C. Roettger Jr. on 5/16/94) CCAP (lh) [Entry date 05/23/94]
5/23/94	32	MOTION by Harry Olstein, William Paulus Jr., Ernest J. Sabato, Leonard Bellezza to extend time to file reply to memorandum in opposition (lh) [Entry date 05/24/94]
5/27/94	33	MOTION by Harry Olstein, William Paulus Jr., Ernest J. Sabato, Leonard Bellezza to extend time to reply (lh) [Entry date 06/01/94]
6/8/94	34	MOTION by Harry Olstein, Ernest J. Sabato, William Paulus Jr., Leonard Bellezza to extend time (lh) [Entry date 06/13/94]
6/10/94	35	NOTICE of filing certification of Michael M. Rosenbaum by Harry Olstein, William Paulus Jr., Ernest J. Sabato, Leonard Bellezza (lh) [Entry date 06/13/94]
6/13/94	36	REPLY by Ronald M. Prupis, Leonard Bellezza, William D. Lipkind, Neil L. Prupis, Ernest J. Sabato, William Paulus Jr., Harry Olstein, Frederick C. Mezey, Bryon L. Sparber, Joseph S. Littenberg to response to motion to dismiss (lh) [Entry date 06/14/94]
6/22/94	37	ORDER granting [34-1] motion to extend time (signed by Judge Norman C. Roettger Jr. on 6/23/94) CCAP (lh) [Entry date 06/23/94]
6/22/94	38	ORDER [33-1] motion to extend time to reply, [32-1] motion to extend time to file reply to memorandum in opposition,

		that the motion to dismiss is Denied (signed by Judge Norman C. Roettger Jr. on 6/20/94) CCAP (lh) [Entry date 06/23/94]
6/22/94	39	ORDER granting [32-1] motion to extend time to file reply to memorandum in opposition (signed by Judge Norman C. Roettger Jr. on 6/20/94) CCAP (lh) [Entry date 06/23/94]
6/22/94	40	ORDER granting [33-1] motion to extend time to reply (signed by Judge Norman C. Roettger Jr. on 6/20/94) CCAP (lh) [Entry date 06/23/94]
7/13/94	41	MOTION by Leonard Bellezza, Harry Olstein, William Paulus Jr., Ernest J. Sabato to extend time to respond to complaint (cg) [Entry date 07/15/94]
7/14/94	42	ORDER granting [41-1] motion to extend time to respond to complaint (signed by Judge Norman C. Roettger Jr. on 7/14/94) CCAP (lh) [Entry date 07/19/94]
8/9/94	43	MOTION by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein to extend time (lh) [Entry date 08/16/94]
8/17/94	44	ANSWER by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein to Crossclaims and Third-Party Claim (lh) [Entry date 08/22/94]
8/31/94	45	STIPULATION of dismissal by Robert A. Beck II (lh) [Entry date 09/07/94]

10/17/94	46	NOTICE of filing affidavit of Roy H. Wepner by Joseph S. Littenberg (lh) [Entry date 10/19/94]
10/17/94	47	AFFIDAVIT of Roy H. Wepner by Joseph S. Littenberg (lh) [Entry date 10/19/94]
11/2/94	48	NOTICE of voluntary dismissal of count II of complaint as to Littenberg by Robert A. Beck II (ll) [Entry date 11/07/94]
11/4/94	49	NOTICE by Joseph S. Littenberg to take deposition of Robert A. Beck II 11/16/94 at 9:30 (ll) [Entry date 11/07/94]
11/4/94	50	MOTION by Joseph S. Littenberg for Rule 11 sanctions (ll) [Entry date 11/07/94]
11/4/94	51	MEMORANDUM by Joseph S. Littemberg in support of [50-1] motion for Rule 11 sanctions (ll) [Entry date 11/07/94]
11/4/94	52	AMENDED MEMORANDUM by Joseph S. Littenberg in support of [51-1] support memorandum, [50-1] motion for Rule 11 sanctions (ll) [Entry date 11/07/94]
11/8/94	53	ORDER granting [43-1] motion to extend time (signed by Judge Norman C. Roettger Jr. on 11/7/94) CCAP (lh) [Entry date 11/17/94]
11/14/94	54	MOTION by Robert A. Beck II to extend time (lh) [Entry date 11/17/94]
11/14/94	55	RE-NOTICE by Joseph S. Littenberg to take deposition of Robert A. Beck, II 12/1/94 at 10:00 (lh) [Entry date 11/17/94]

11/22/94	56	ORDER granting [54-1] motion to extend time (signed by Judge Norman C. Roettger Jr. on 11/21/94) CCAP (lh) [Entry date 11/23/94]
11/22/94	57	ORDER, set pretrial conference for 10:00 1/31/95 before Magistrate Barry S. Seltzer (signed by Judge Norman C. Roettger Jr. on 11/18/94) CCAP (lh) [Entry date 11/30/94]
11/23/94	58	RE-NOTICE by Joseph S. Littenberg to take deposition of Robert 12/7/94 at 10:00 (lh) [Entry date 12/02/94]
11/29/94	59	MOTION by Robert A. Beck II to extend time (lh) [Entry date 12/02/94]
12/5/94	61	MOTION by Robert A. Beck II to extend time to file response to motion for sanctions (lh) [Entry date 12/07/94]
12/6/94	60	MEMORANDUM by Robert A. Beck II in opposition to [50-1] motion for Rule 11 sanctions (lh) [Entry date 12/07/94]
12/7/94	62	AFFIDAVIT of Jay Starkman by Robert A. Beck II Re: [60-1] opposition memorandum (lh) [Entry date 12/08/94]
12/7/94	63	AFFIDAVIT by Robert A. Beck II Re: [60-1] opposition memorandum (lh) [Entry date 12/08/94]
12/15/94	64	MOTION with memorandum in support by Bryon L. Sparber to dismiss crossclaim and strike notice of appearance (lh) [Entry date 12/19/94]
12/15/94	65	AFFIDAVIT by Bryon L. Sparber Re: [64-1] motion to dismiss crossclaim and

		strike notice of appearance (lh) [Entry date 12/19/94]
12/16/94	66	MOTION by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein for Richard M. DeAgazio to appear pro hac vice (lh) [Entry date 12/20/94]
12/16/94	67	MOTION by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein for Kenneth J. Cesta to appear pro hac vice (lh) [Entry date 12/20/94]
12/22/94	68	MOTION with memorandum in support by Robert A. Beck II, Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein, Joseph S. Littenberg to continue pre-trial conference (ll) [Entry date 12/27/94]
12/22/94	69	NOTICE of vacation (lh) [Entry date 12/29/94]
12/23/94	70	AMENDMENT by Joseph S. Littenberg to: [49-1] deposition notice – to 1/5/95 at 9:30 (lh) [Entry date 12/29/94]
12/28/94	71	MOTION by Robert A. Beck II to extend time to file response to motion to dismiss (lh) [Entry date 12/29/94]
1/3/95	72	ORDER granting [61-1] motion to extend time to file response to motion for sanctions (signed by Judge Norman C. Roettger Jr. on 12/27/94) CCAP (lh) [Entry date 01/05/95]
1/3/95	73	ORDER granting [59-1] motion to extend time (signed by Judge Norman C. Roettger Jr. on 12/27/94) CCAP (lh) [Entry date 01/05/95]

1/3/95	74	ORDER granting [71-1] motion to extend time to file response to motion to dismiss (signed by Judge Norman C. Roettger Jr. on 12/29/94) CCAP (lh) [Entry date 01/05/95]
1/3/95	75	ORDER granting [68-1] motion to continue pre-trial conference (signed by Judge Norman C. Roettger Jr. on 12/29/94) CCAP (lh) [Entry date 01/05/95]
1/4/95	76	MOTION by Robert A. Beck II to extend time to file response to motion to dismiss and motion to strike notice of appearance (lh) [Entry date 01/10/95]
1/6/95	77	NOTICE by Joseph S. Littenberg to take deposition of Robert A. Beck 1/27/95 at 10:30 (lh) [Entry date 01/10/95]
1/10/95	78	RE-NOTICE by Joseph S. Littenberg to take deposition of Robert A. Beck 1/27/95 at 10:30 (lh) [Entry date 01/11/95]
1/10/95	79	MEMORANDUM by Robert A. Beck II in opposition to [64-1] motion to dismiss crossclaim and strike notice of appearance (lh) [Entry date 01/13/95]
1/13/95	80	NOTICE of continuation of deposition by Joseph S. Littenberg (lh) [Entry date 01/17/95]
1/17/95	81	MOTION by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein to dismiss Beck's crossclaims or, alternatively, to compel discovery (lh) [Entry date 01/18/95]

1/17/95	82	MEMORANDUM by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein in support of [81-1] motion to dismiss Beck's crossclaims or, alternatively, to compel discovery (lh) [Entry date 01/18/95]
1/17/95	83	Certification of Kenneth R. Hartmann, Esq. by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein (lh) [Entry date 01/18/95]
1/18/95	84	ORDER, reset pretrial conference for 10:00 3/21/95 (signed by Magistrate Barry S. Seltzer on 1/16/95) CCAP (lh) [Entry date 01/23/95]
1/20/95	85	NOTICE to take deposition of Robert A. Beck, II 2/6/95 at 10:00 (lh) [Entry date 01/24/95]
1/23/95	86	REPLY by Bryon L. Sparber to response to [64-1] motion to dismiss crossclaim and strike notice of appearance (lh) [Entry date 01/24/95]
1/24/95	87	MOTION with memorandum in support by Bryon L. Sparber for leave to file reply in excess of ten pages in support of his motion to dismiss (lh) [Entry date 01/25/95]
1/25/95	88	STIPULATION of dismissal by Robert A. Beck II (lh) [Entry date 01/30/95]
1/30/95	89	MOTION by Robert A. Beck II to extend time to respond to motion to dismis (lh)
2/6/95	90	MEMORANDUM by Robert A. Beck II in opposition to [81-1] motion to dismiss Beck's crossclaims or, alternatively, to compel discovery (lh) [Entry date 02/07/95]

2/6/95	91	ORDER granting [88-1] dismiss/dismissal stipulation (signed by Judge Norman C. Roettger Jr. on 2/1/95 CCAP (lh) [Entry date 02/08/95]
2/6/95	92	ORDER granting [89-1] motion to extend time to respond to motion to dismis [sic] (signed by Judge Norman C. Roettger Jr. on 2/3/95 CCAP (lh) [Entry date 02/08/95]
2/8/95	93	NOTICE of change of attorney's address by Joseph S. Littenberg (lh) [Entry date 02/09/95]
2/14/95	94	MOTION with memorandum in support by Robert A. Beck II for protective order (lh) [Entry date 02/15/95]
2/15/95	95	MOTION by Robert A. Beck II to compel answers to interrogatories and production of documents (lh) [Entry date 02/21/95]
2/17/95	96	NOTICE of vacation by Robert A. Beck II (lh) [Entry date 02/21/95]
2/17/95	97	REPLY by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein to response to [81-1] motion to dismiss Beck's crossclaims or, alternatively, to compel discovery (lh) [Entry date 02/21/95]
2/21/95	98	MOTION by Frederick C. Mezey for protective order and certification in support thereof (lh) [Entry date 02/27/95]

2/22/95	99	MOTION by Robert A. Beck II to reschedule pretrial conference consistent with Judge Roettger's Order (lh) [Entry date 02/27/95]
2/22/95	100	ORDER granting [76-1] motion to extend time to file response to motion to dismiss and motion to strike notice of appearance (signed by Judge Norman C. Roettger Jr. on 2/20/95) CCAP (lh) [Entry date 02/27/95]
2/23/95	103	ORDER referring case to mediation. set Jury trial for 10:00 4/10/95 15 days to appoint mediator (signed by Judge Norman C. Roettger Jr. on 2/10/95) CCAP (lh) [Entry date 03/08/95]
2/23/95	104	ORDER Re: Trial Instructions (signed by Judge Norman C. Roettger Jr. on 2/10/95 CCAP (lh) [Entry date 03/08/95]
2/24/95	101	ORDER granting [99-1] motion to reschedule pretrial conference consistent with Judge Roettger's Order, and reset pretrial conference for 2:00 5/8/95 (signed by Magistrate Barry S. Seltzer on 2/24/95) CCAP (lh) [Entry date 02/27/95]
2/28/95	102	MOTION by Robert A. Beck II for clarification of [101-1] order reset pretrial conference for 2:00 5/8/95 (lh) [Entry date 03/02/95]
2/28/95	106	ORDER, reset pretrial conference for 10:00 4/7/95 (signed by Magistrate Barry S. Seltzer on 2/28/95) CCAP (lh) [Entry date 03/08/95)

3/1/95	105	MOTION by Robert A. Beck II to continue trial (lh) [Entry date 03/08/95]
3/6/95	107	JOINDER MOTION by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein for clarification of [101-1] order reset pretrial conference for 2:00 5/8/95 (lh) [Entry date 03/10/95]
3/6/95	108	MOTION by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein for relief from pretrial orders regarding disclosure of expert testimony (lh) [Entry date 03/10/95]
3/6/95	109	JOINDER MOTION by Joseph S. Littenberg for clarification of [102-1] motion for clarification of [101-1] order reset pretrial conference for 2:00 5/8/95 (lh) [Entry date 03/10/95]
3/6/95	113	ORDER granting [67-1] motion for Kenneth J. Cesta to appear pro hac vice, granting [66-1] motion for Richard M. DeAgazio to appear pro hac vice (signed by Judge Norman C. Roettger Jr. on 3/1/95) CCAP (lh) [Entry date 03/15/95]
3/9/95	114	MOTION by Joseph S. Littenberg to dismiss Beck's cross-claim or, alternatively, to compel discovery (lh) [Entry date 03/15/95]
3/13/95	115	MOTION to refer all discovery matters to Magistrate Judge (lh) [Entry date 03/15/95]
3/13/95	116	NOTICE/Request by New Jersey Group for case management conference (lh) [Entry date 03/15/95]

3/13/95 117 MOTION by New Jersey Group to conduct trial in Miami Divison (lh) [Entry date 03/15/95]

3/14/95 126 MOTION by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein to continue trial (lh) [Entry date 03/22/95]

3/14/95 127 ORDER granting [126-1] motion to continue trial, denying [117-1] motion by New Jersey Group to conduct trial in Miami Division, denying [115-1] motion to refer all discovery matters to Magistrate Judge, denying [108-1] motion for relief from pretrial orders regarding disclosure of expert testimony, granting [102-1] motion for clarification of [101-1] order reset pretrial conference for 2:00 5/8/95, denying [98-1] motion for protective order and certification in support thereof, granting [95-1] motion to compel answers to interrogatories and production of documents, denying [94-1] motion for protective order, denying [87-1] motion for leave to file reply in excess of ten pages in support of his motion to dismiss, granting in part, denying in part [81-1] motion to dismiss Beck's crossclaims or, alternatively, to compel discovery (signed by Judge Norman C. Roettger Jr. on 3/14/95) CCAP (lh) [Entry date 03/22/95]

3/15/95 110 DEPOSITION of Joseph Littenberg (lh)

3/15/95 111 DEPOSITION of Joseph Littenberg (lh)

3/15/95 112 DEPOSITION of Robert A. Beck, II (lh)

3/15/95 118 MOTION by Joseph S. Littenberg for summary judgment (lh) [Entry date 03/20/95]

3/15/95 119 MEMORANDUM by Joseph S. Littenberg in support of [118-1] motion for summary judgment (lh) [Entry date 03/20/95]

3/15/95 120 NOTICE of filing deposition transcripts in support by Joseph S. Littenberg (lh) [Entry date 03/20/95]

3/15/95 121 NOTICE/REQUEST by Joseph S. Littenberg for oral argument on motion for summary judgment (lh) [Entry date 03/20/95]

3/15/95 122 Statement of: Material facts by Joseph S. Littenberg (lh) [Entry date 03/20/95]

3/17/95 123 MOTION with memorandum in support by Bryon L. Sparber for leave to file an abbreviated reply in support of his motion to dismiss (lh) [Entry date 03/20/95]

3/17/95 124 AMENDMENT by Leonard Bellezza, William Paulus Jr., Ernest J. Sabato, Harry Olstein to: [90-1] opposition memorandum (lh) [Entry date 03/20/95]

3/17/95 125 REPLY by Bryon L. Sparber to response to [64-1] motion to dismiss crossclaim and strike notice of appearance (lh) [Entry date 03/20/95]

3/17/95 128 MOTION by Robert A. Beck II to extend time to oppose defendant Littenberg's motion for summary judgment (lh) [Entry date 03/22/95]

3/20/95	130	MOTION with memorandum in support by Robert A. Beck II for protective order (lh) [Entry date 03/22/95]
3/21/95	129	STIPULATION by Robert A. Beck II, Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein, Joseph S. Littenberg In Re: as to residence of witnesses and parties (lh) [Entry date 03/22/95]
3/23/95	131	RESPONSE by Joseph S. Littenberg in opposition to [128-1] motion to extend time to oppose defendant Littenberg's motion for summary judgment (lh) [Entry date 03/24/95]
3/27/95	132	MOTION by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein to Take Deposition (lh)
3/27/95	133	Concise Statement of: Material Facts as to which it is contended that there exists a genuine issue to be tried, precluding Littenberg's motion for summary judgment by Robert A. Beck II (lh) [Entry date 03/28/95]
3/27/95	134	MEMORANDUM by Robert A. Beck II in opposition to [118-1] motion for summary judgment (lh) [Entry date 03/28/95]
3/30/95	135	NOTICE of Request for oral argument on motion for summary judgment by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein (lh)
3/30/95	136	MOTION by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein

		for summary judgment (lh) [Entry date 03/31/95]
3/30/95	137	MEMORANDUM by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein in support of [136-1] motion for summary judgment (lh) [Entry date 03/31/95]
3/30/95	138	Statement of: Material Facts by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein (lh) [Entry date 03/31/95]
3/31/95	139	MOTION to quash subpoena by non-party Ronald Turner (lh) [Entry date 04/04/95]
4/3/95	140	MOTION with memorandum in support by Robert A. Beck II for default judgment against Ronald M. Prupis (lh) [Entry date 04/04/95]
4/3/95	141	MOTION with memorandum in support by Robert A. Beck II to compel production of the New Jersey Group's settlement agreement, sworn statements and related documents (lh) [Entry date 04/04/95]
4/3/95	142	MOTION by Robert A. Beck II in limine (lh) [Entry date 04/04/95]
4/3/95	143	MEMORANDUM by Robert A. Beck II in support of [142-1] motion in limine (lh) [Entry date 04/04/95]
4/3/95	144	MEMORANDUM by Leonard Bellezza in opposition to defendants Neil Prupis and William Lipkind's motion to dismiss (lh) [Entry date 04/04/95]

4/3/95	145	JOINT PRETRIAL STIPULATION by Robert A. Beck II, Leonard Bellezza, Ernst J. Sabato, William Paulus Jr., Harry Olstein, Frederick C. Mezey, Bryon L. Sparber, Joseph S. Littenberg (lh) [Entry date 04/04/95]
4/3/95	147	NOTICE of Mediation Hearing on 4/5/95 John Finn added as mediator (lh) [Entry date 04/06/95]
4/4/95	146	MOTION by Leonard Bellezza, Ernst J. Sabato, William Paulus Jr., Harry Olstein to Take Deposition of Ronald Turner (lh) [Entry date 04/05/95]
4/5/95	148	ORDER, Motion hearing before Judge Norman C. Roettger Jr. set for 9:15 4/28/95 for [118-1] motion for summary judgment, and reset Jury trial for 6/21/95 (signed by Judge Norman C. Roettger Jr. on 4/4/95) CCAP (lh) [Entry date 04/10/95]
4/7/95	149	Minute entry for pretrial conference proceeding held before Magistrate Barry S. Seltzer on 4/7/95 Court Reporter name: Tape (lh) [Entry date 04/10/95]
4/7/95	150	REPLY by Joseph S. Littenberg to response to [118-1] motion for summary judgment (lh) [Entry date 04/10/95]
4/10/95	151	STATUS REPORT ORDER on PRETRIAL CONFERENCE. (signed by Magistrate Barry S. Seltzer on 4/10/95) CCAP (lh) [Entry date 04/11/95]
4/10/95	152	MOTION by Robert A. Beck II to amend exhibit list to correct a Scrivener's error (lh) [Entry date 04/12/95]

4/12/95	156	MOTION by Robert A. Beck II to extend time to oppose motion for summary judgment (lh) [Entry date 04/19/95]
4/12/95	157	MOTION by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein to extend time to respond to motion in limine, motion to compel (lh) [Entry date 04/19/95]
4/14/95	153	MOTION with memorandum in support by William D. Lipkind, Neil L. Prupis for separate trials (dp) [Entry date 04/18/95]
4/14/95	154	REPLY by William D. Lipkind, Neil L. Prupis to response to motion to dismiss (dp) [Entry date 04/18/95]
4/14/95	155	Certification of Alan Grunspan re: motion to dismiss by William D. Lipkind, Neil L. Prupis (dp) [Entry date 04/18/95]
4/18/95	158	FINAL report of Mediator. Disposition: Impasse (lh) [Entry date 04/21/95]
4/20/95	159	RESPONSE by Robert A. Beck II to [136-1] motion for summary judgment (dp) [Entry date 04/24/95]
4/20/95	160	EXHIBITS to: [159-1] motion response by Robert A. Beck II (dp) [Entry date 04/24/95]
4/20/95	161	EXHIBITS to: [159-1] motion response by Robert A. Beck II (dp) [Entry date 04/24/95]
4/20/95	162	EXHIBITS to: [159-1] motion response by Robert A. Beck II (dp) [Entry date 04/24/95]

4/20/95	163	Statement of material facts: by Robert A. Beck II (dp) [Entry date 04/24/95]
4/26/95	164	MEMORANDUM by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein in support of [136-1] motion for summary judgment (ll) [Entry date 05/01/95]
4/26/95	165	Certification of Kenneth Hartmann re: motion for summary judgment by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein (ll) [Entry date 05/01/95]
4/28/95	166	NOTICE of filing deposition transcript in support of motion for summary judgment by Joseph S. Littenberg (dp) [Entry date 05/03/95]
5/3/95	167	NOTICE of absence from the jurisdiction from 8/4-25/95 by Joseph S. Littenberg (dp)
5/3/95	168	ORDER granting in part, denying in part [64-1] motion to dismiss crossclaim and strike notice of appearance (signed by Judge Norman C. Roettger Jr. on 5/3/95) CCAP (lh) [Entry date 05/04/95]
5/4/95	169	MOTION by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein to extend time to respond to motion in limine and motion to compel (lh) [Entry date 05/08/95]
5/4/95	170	ORDER, Denying motion to dismiss (signed by Judge Norman C. Roettger Jr. on 4/25/95) CCAP (lh) [Entry date 05/08/95]

5/12/95	171	NOTICE of attorney appearance for William D. Lipkind, Neil L. Prupis by Alan Michael Grunspan (lh) [Entry date 05/16/95]
5/12/95	172	MOTION by Leonard Bellezza, Neil L. Prupis, Ernest J. Sabato, Harry Olstein to extend time to reply to motion in limine (dp) [Entry date 05/16/95]
5/12/95	173	RESPONSE by Leonard Bellezza, Neil L. Prupis, Ernest J. Sabato, Harry Olstein to [141-1] motion to compel production of the New Jersey Group's settlement agreement, sworn statements and related documents (dp) [Entry date 05/16/95]
5/17/95	174	ANSWER by Ronald M. Prupis, William D. Lipkind to crossclaim (lh) [Entry date 05/19/95]
5/17/95	175	NOTICE of vacation ? (lh) [Entry date 05/23/95]
5/19/95	176	MOTION by Robert A. Beck II to extend time to reply in support of motion to compel (lh) [Entry date 05/23/95]
5/22/95	177	MOTION by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein to extend time to reply to motion in limine (dp) [Entry date 05/26/95]
5/25/95	178	SUPPLEMENT by Leonard Bellezza to: [164-1] support memorandum (lh) [Entry date 05/30/95]
5/25/95	179	MOTION by Leonard Bellezza for leave to file supplemental memorandum of law (lh) [Entry date 05/30/95]

5/25/95	180	MEMORANDUM by Leonard Bellezza in opposition to [142-1] motion in limine (lh) [Entry date 05/30/95]
5/25/95	181	AFFIDAVIT of Tania Guerra (lh) [Entry date 05/31/95]
5/25/95	182	NOTICE of filing affidavit of Tania Guerra by the New Jersey Group (lh) [Entry date 05/31/95]
5/30/95	183	REPLY by Robert A. Beck II to response to [141-1] motion to compel production of the New Jersey Group's settlement agreement, sworn statements and related documents (lh) [Entry date 06/05/95]
6/6/95	184	Transcript filed re: Date: 4/28/95 Before Judge: Roettger Number of pages: 1 thru 76 (lh)
6/6/95	185	MOTION by Robert A. Beck II to amend witness list (lh) [Entry date 06/07/95]
6/7/95	186	MOTION by Robert A. Beck II to extend time to file reply memorandum in support of motion in limine (lh) [Entry date 06/08/95]
6/7/95	187	MOTION with memorandum in support by William D. Lipkind, Neil L. Prupis for leave to file summary judgment motion (lh) [Entry date 06/08/95]
6/7/95	188	MOTION with memorandum in support by William D. Lipkind, Neil L. Prupis for summary judgment against the Belleza Group's Crossclaim for contribution (lh) [Entry date 06/08/95]

6/7/95	189	Statement of: Material Facts as to which there exists no genuine issue to be tried in support of their motion for summary judgment by William D. Lipkind, Neil L. Prupis (lh) [Entry date 06/08/95]
6/9/95	190	MEMORANDUM by Robert A. Beck II in opposition to [179-1] motion for leave to file supplemental memorandum of law (lh) [Entry date 06/12/95]
6/12/95	191	ORDER granting [136-1] motion for summary judgment, for summary judgment denying [188-1] motion for summary judgment against the Belleza Group's Crossclaim for contribution, denying [187-1] motion for leave to file summary judgment motion, denying [186-1] motion to extend time to file reply memorandum in support of motion in limine, denying [185-1] motion to amend witness list, denying [179-1] motion for leave to file supplemental memorandum of law, denying [177-1] motion to extend time to reply to motion in limine, denying [176-1] motion to extend time to reply in support of motion to compel, denying [172-1] motion to extend time to reply to motion in limine, denying [169-1] motion to extend time to respond to motion in limine and motion to compel, denying [153-1] motion for separate trials, denying [157-1] motion to extend time to respond to motion in limine, motion to compel, denying [156-1] motion to extend time to oppose motion for summary judgment, denying [152-1]

motion to amend exhibit list to correct a Scrivener's error, denying [146-1] motion to Take Deposition of Ronald Turner, denying [142-1] motion in limine, denying [141-1] motion to compel production of the New Jersey Group's settlement agreement, sworn statements and related documents, denying [140-1] motion for default judgment against Ronald M. Prupis, denying [139-1] motion to quash subpoena by non-party Ronald Turner, denying [132-1] motion to Take Deposition, denying [130-1] motion for protective order, denying [123-1] motion for leave to file an abbreviated reply in support of his motion to dismiss, denying [128-1] motion to extend time to oppose defendant Littenberg's motion for summary judgment, denying [118-1] motion for summary judgment, denying [114-1] motion to dismiss Beck's cross-claim or, alternatively, to compel discovery, denying [109-1] motion for clarification of [102-1] motion for clarification of [101-1] order reset pretrial conference for 2:00 5/8/95, denying [107-1] motion for clarification of [101-1] order reset pretrial conference for 2:00 5/8/95, denying [105-1] motion to continue trial, denying [50-1] motion for Rule 11 sanctions (signed by Judge Norman C. Roettger Jr. on 6/7/95) CCAP (lh) [Entry date 06/13/95]

6/12/95	—	Case closed (lh) [Entry date 06/13/95]
6/21/95	192	NOTICE of Pendency of Motion by Joseph S. Littenberg re: [50-1] motion for

		Rule 11 sanctions (lh) [Entry date 06/26/95]
7/5/95	193	NOTICE OF APPEAL by Robert A. Beck II of [191-1] order for summary judgment, [168-1] order. EOD Date: 05/04/95; Filing Fee: $105.00; Receipt #: 508023; Appeal record due on 7/15/95 Copies to USCA and Counsel of Record. (gf) [Entry date 07/06/95]
7/6/95	—	Certified copies of Notice of Appeal, Docket, and Order under appeal to USCA: [193-1] appeal by Robert A. Beck II (gf)
7/7/95	194	MOTION by Leonard Bellezza, Harry Olstein, Ernest J. Sabato to Tax Costs, and for bill of costs (lh) [Entry date 07/11/95]
7/7/95	195	AFFIDAVIT of Michael M. Rosenbaum Re: [194-2] motion for bill of costs (lh) [Entry date 07/11/95]
7/7/95	196	MOTION by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein for sanctions (lh) [Entry date 07/11/95]
7/7/95	197	AFFIDAVIT of Michael M. Rosenbaum Re: [196-1] motion for sanctions (lh) [Entry date 07/11/95]
7/7/95	198	NOTICE/REQUEST for oral argument on motion for sanctions by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein (lh) [Entry date 07/11/95]
7/7/95	199	CERTIFICATE OF SERVICE by Leonard Bellezza, Ernest J. Sabato, William

Paulus Jr., Harry Olstein (lh) [Entry date 07/11/95]

7/11/95 200 Certification re: conference by Leonard Bellezza (lh) [Entry date 07/13/95]

7/14/95 — NOTICE of Receipt of Transmittal Letter from USCA Re: [193-1] appeal by Robert A. Beck II USCA NUMBER: 95-4844 (gf) [Entry date 09/01/95]

7/17/95 204 TRANSCRIPT filed [193-1] appeal by Robert A. Beck II for dates of 4/28/95 Appeal record due on 8/1/95 (lh) [Entry date 07/21/95]

7/18/95 201 MOTION by Robert A. Beck II to extend time to oppose motion for sanctions (lh) [Entry date 07/19/95]

7/18/95 202 MOTION by Robert A. Beck II to extend time to oppose motion for tax costs (lh) [Entry date 07/19/95]

7/20/95 203 NOTICE OF JOINDER AND ADOPTION of the Bellezza Group's Motion for sanctions by Joseph S. Littenberg (lh) [Entry date 07/21/95]

7/20/95 205 Minute of summary judgment held before Judge Norman C. Roettger Jr. on 4/28/95; Court Reporter Name: Goldfarb (lh) [Entry date 07/27/95]

7/28/95 206 MOTION by Robert A. Beck II to extend time to file memorandum in opposition to motion for tax costs (lh) [Entry date 08/02/95]

7/31/95 207 MEMORANDUM by Robert A. Beck II in opposition to [194-1] motion to Tax Costs (lh) [Entry date 08/03/95]

7/31/95 — Appeal Information Sheet re:[193-1] appeal by Robert A. Beck II. No transcript requested. Appeal Record due on 7/18/95 (gf) [Entry date 08/31/95]

8/4/95 208 MOTION by Robert A. Beck II to extend time to file opposition to motion for sanctions (lh) [Entry date 08/09/95]

8/7/95 209 ORDER granting [206-1] motion to extend time to file memorandum in opposition to motion for tax costs (signed by Judge Norman C. Roettger Jr. on 8/7/95) CCAP (lh) [Entry date 08/09/95]

8/7/95 210 ORDER granting [208-1] motion to extend time to file opposition to motion for sanctions (signed by Judge Norman C. Roettger Jr. on 8/5/95) CCAP (lh) [Entry date 08/11/95]

8/9/95 211 MOTION by Leonard Bellezza to extend time to reply to motion to tax cost (lh) [Entry date 08/14/95]

8/10/95 212 ORDER granting [201-1] motion to extend time to oppose motion for sanctions (signed by Judge Norman C. Roettger Jr. on 8/10/95) CCAP (lh) [Entry date 08/14/95]

8/10/95 213 ORDER granting [202-1] motion to extend time to oppose motion for tax costs (signed by Judge Norman C. Roettger Jr. on 8/10/95) CCAP (lh) [Entry date 08/14/95]

8/11/95 214 MOTION by Robert A. Beck II to extend time to oppose motion for sanctions (lh) [Entry date 08/14/95]

8/18/95	215	MEMORANDUM by Robert A. Beck II in opposition to [196-1] motion for sanctions (lh) [Entry date 08/22/95]
8/21/95	217	REPLY by Leonard Bellezza to response to [194-1] motion to Tax Costs (lh) [Entry date 08/25/95]
8/22/95	216	ORDER granting [211-1] motion to extend time to reply to motion to tax cost (signed by Judge Norman C. Roettger Jr. on 8/16/95) CCAP (lh) [Entry date 08/25/95]
8/28/95	218	MOTION by Leonard Bellezza to extend time to file reply to memorandum in opposition to motion for Rule 11 sanctions (lh) [Entry date 08/30/95]
9/5/95	219	ORDER granting [214-1] motion to extend time to oppose motion for sanctions (signed by Judge Norman C. Roettger Jr. on 8/28/95) CCAP (lh) [Entry date 09/07/95)
9/22/95	220	REPLY BRIEF by Leonard Bellezza to response to [196-1] motion for sanctions (lh) [Entry date 09/25/95]
9/22/95	221	REPLY AFFIDAVIT of Michael M. Rosenbaum by Leonard Bellezza Re: [196-1] motion for sanctions (lh) [Entry date 09/25/95]
10/3/95	222	RESPONSE by Robert A. Beck II in opposition to [196-1] motion for sanctions (lh) [Entry date 10/04/95]
10/25/95	—	Certificate of readiness transmitted to USCA Re: [193-1] appeal by Robert A. Beck II USCA NUMBER; 95-4844 (gf)

11/15/95	—	ACKNOWLEDGMENT of receipt by U.S.C.A. of: Certificate of Readiness U.S.C.A. #95-4844 (gf) [Entry date 12/01/95]
11/21/95	223	ORDER denying [196-1] motion for sanctions, granting in part, denying in part [194-1] motion to Tax Costs, granting in part, denying in part [194-2] motion for bill of costs singed by Judge Norman C. Roettger Jr. on 11/20/95) CCAP (lh) [Entry date 11/27/95]
12/21/95	224	NOTICE OF APPEAL by Leonard Bellezza, Ernest J. Sabato, William Paulus Jr., Harry Olstein of [223-1] order. EOD Date: 11/27/95; Filing Fee: $105.00; Receipt #: 657455; Appeal record due on 12/31/95 Copies to USCA and Counsel of Record. (gf) [Entry date 12/22/95]
12/22/95	—	Certified copies of Notice of Appeal, Docket, and Order under appeal to USCA: [224-1] appeal by Harry Olstein, William Paulus Jr., Ernest J. Sabato, Leonard Bellezza (gf)
12/28/95	225	MOTION by Robert A. Beck II to supplement the record (lh) [Entry date 12/29/95]

United States Court of Appeals
11th Circuit-Atlanta

Entry Date	Date 2	Docket Entry	Party	Pend
07/14/95	/ /	Probable Jurisdiction Noted Converted from Old CMS.	None	
07/17/95	/ /	Court Reporter Financial Arrangements Converted from Old CMS.	None	
07/18/95	/ /	Transcript Converted from Old CMS.	None	
09/12/95	/ /	Staff Attorney Further Review Converted from Old CMS.	None	
10/30/95	/ /	Certificate of Readiness Converted from Old CMS.	None	
11/13/95	/ /	Briefing Notice Issued Converted from Old CMS.	None	
12/29/95	/ /	Appellant Brief Converted from Old CMS.	None	

03/04/96	/ /	Appellee Brief Converted from Old CMS.	None	
04/01/96	/ /	Reply Brief Converted from Old CMS.	None	
01/08/97	/ /	Argument Scheduled Converted from Old CMS.	None	
12/15/98	/ /	Opinion Issued Converted from Old CMS.	None	
01/19/99	/ /	Mandate Issued Converted from Old CMS.	None	
03/22/99	/ /	Notice of Filing Certiorari – CT#98-1480	None	
03/27/99	/ /	See Previous Docket Sheet for Case Information prior to conversion date. Converted from Old CMS.	None	
06/09/99	06/07/99	Certiorari Granted	None	

INSURANCE CONSULTANTS OF AMERICA, INC., EMPLOYEE PENSION PLAN, et al.,	:	UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY
Plaintiffs,	:	CASE NO. 89-3389xx AJL
vs.	:	
SOUTHEASTERN INSURANCE GROUP INC., a Florida Corporation, et al.,	:	
Defendants.	:	

DEFENDANT BECK'S CROSSCLAIM AND THIRD PARTY COMPLAINT

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INSURANCE CONSULTANTS OF AMERICA, INC., EMPLOYEE PENSION PLAN, et al.,	:	UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY
Plaintiffs,	:	CASE NO. 89-3389xx AJL
vs.	:	
SOUTHEASTERN INSURANCE GROUP a Florida Corporation, et al.,	:	
Defendants.	:	

DEFENDANT, BECK'S, CROSSCLAIM AND THIRD PARTY COMPLAINT

(Filed May 31, 1990)

Crossplaintiff and third party plaintiff, Robert A. Beck, II ("BECK"), sues crossdefendants, Ronald M. Prupis ("R. PRUPIS"), Leonard Bellezza ("BELLEZZA"), William D. Lipkind ("LIPKIND"), Neil L. Prupis ("N. PRUPIS"), Ernest J. Sabato ("SABATO"), William Paulus, Jr. ("PAULUS"), Harry Olstein ("OLSTEIN"), Frederick C. Mezey ("MEZEY"), Byron L. Sparber ("SPARBER"), and Joseph S. Littenberg ("LITTENBERG"), as well as third party defendants, Robert Pershes ("PERSHES") and Firemark Consultants, Inc. ("FIREMARK"), and states that:

I. NATURE OF THE ACTION

1. These claims arise under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* and the common law of New Jersey.

2. All conditions precedent to bringing these claims have been performed or have occurred.

3. This court has jurisdiction over this action pursuant to 18 U.S.C. §§ 1964 and 1965 and the doctrines of pendant and ancillary jurisdiction.

II. THE PARTIES

4. Crossplaintiff and third party plaintiff, BECK, is a resident of Palm Beach County, Florida. Until May 13, 1988, he was President of Southeastern Insurance Group, Inc. ("SIG").

5. Crossdefendants, BELLEZZA, SABATO, PAULUS, OLSTEIN, LIPKIND, N. PRUPIS, MEZEY and LITTENBERG are citizens of the State of New Jersey. Crossdefendants, R. PRUPIS and SPARBER, as well as third party defendant, PERSHES, are residents of the State of Florida. All of these persons were either senior officers or directors of SIG and/or its subsidiaries. They are referred to throughout this complaint as "the Senior Officers and Directors."

6. Third party defendant, FIREMARK, is a New Jersey corporation, having its principal place of business in the State of New Jersey. FIREMARK was an agent for the Senior Officers and Directors of SIG as a consultant on behalf of SIG. FIREMARK, at all relevant times, acted through its agents and owner-employees including

Michael J. Morrissey, Chairman, and Joanne S. Morrissey, President.

7. SIG was a Florida corporation, which, until January 5, 1990, had its principal place of business in Florida. On January 5, 1990, SIG filed a petition for bankruptcy in the Southern District of Florida. Since its inception and until it declared bankruptcy, SIG engaged in a business which affected interstate commerce. Specifically, SIG was a holding company whose subsidiaries operated various businesses, including insurance and surety.

8. SIG is an enterprise within the meaning of RICO, 18 U.S.C. § 1961(4).

9. BELLEZZA, SABATO, PAULUS, OLSTEIN, LIPKIND, N. PRUPIS, R. PRUPIS, MEZEY, SPARBER, PERSHES and LITTENBERG are all "persons" within the meaning of RICO, 18 U.S.C. § 1961(3). By virtue of each of these persons' association with each other and through their interests in SIG, each maintains or has maintained an interest in, or was employed by or associated with, the enterprise identified above.

10. FIREMARK is a "person" within the meaning of RICO, 18 U.S.C. § 1961(3). By virtue of its position as agent to the Senior Officers and Directors and to SIG, FIREMARK maintains or maintained an interest in, or is or has been employed by or associated with, the enterprise identified above.

III. GENERAL ALLEGATIONS

A. SCHEME AND ARTIFICE TO DEFRAUD, TO OBTAIN MONEY AND PROPERTY AND TO INTERFERE WITH COMMERCE BY MEANS OF EXTORTION

11. Beginning in or around the fall of 1985, the Senior Officers and Directors devised and intended to devise a scheme and artifice to defraud and to obtain money and property from BECK and others by means of false and fraudulent pretenses, representations and promises, and to obstruct, delay and affect commerce by means of extortion. The defendants knew that the pretenses, representations and promises were false and fraudulent.

12. It was the essence of the scheme and artifice that the Senior Officers and Directors engaged in a pattern of racketeering activity calculated to make it appear that BECK was responsible for their misdeeds in the operation of SIG and to damage him financially.

13. The Senior Officers and Directors fraudulently caused SIG to terminate BECK "for cause" so that they could continue and preserve their racketeering activity, prevent BECK from effectively "blowing the whistle," and, at the same time, avoid their enterprise being liable to BECK for damages for breach of contract. They also damaged BECK's reputation so that his claims of their improper acts would not be believed and also so that he could be a scapegoat they could blame for their improper activities.

14. The Senior officers and Directors further fraudulently induced BECK to guarantee SIG obligations personally. They also committed abuses which inevitably triggered those guarantees.

15. BELLEZZA, R. PRUPIS, N. PRUPIS, PAULUS, LIPKIND, MEZEY, OLSTEIN and SPARBER further fraudulently induced BECK to make an unsecured loan to SIG. The Senior Officers and Directors committed abuses and looted the company, causing SIG to be unable to repay BECK.

16. The Senior officers and Directors, for the purpose of executing and attempting to execute the aforesaid scheme and artifice: did knowingly and intentionally cause to be delivered by the United States Postal Service, according to the direction thereon, various letters and other matters and things, in repeated violation of 18 U.S.C. § 1341 (mail fraud); did knowingly and intentionally cause to be transmitted in interstate commerce by means of wire communications, signs, signals and sounds, that is telephonic communications, in repeated violation of 18 U.S.C. § 1343 ("wire fraud"); and did knowingly and intentionally obstruct, delay and affect commerce and conspired to do so by means of extortion, in violation of 18 U.S.C. § 1951, all more fully described below.

17. The Senior Officers and Directors operated SIG solely for their personal financial benefit and to the detriment of SIG, BECK and others. The following abuses and criminal acts, all of which constitute racketeering activity, were committed pursuant to their scheme and artifice to

defraud, to obtain money and property and to interfere with commerce by threats:

a. Fraudulent Financial Statements

18. Beginning in or around August of 1987, R. PRUPIS, N. PRUPIS, PERSHES, PAULUS, LIPKIND and BELLEZZA conspired to falsify claims information, for the purpose of issuing fraudulent financial statements to BECK, to the regulators, to the federal government, to First Fidelity Bank, and to the shareholders and creditors of SIG.

19. For example, R. PRUPIS, N. PRUPIS, PERSHES, PAULUS, LIPKIND and BELLEZZA caused SIG to treat claims made by Chief Structures, Inc. ("Chief") as a "workout," where claim payments (an expense) were fraudulently portrayed as "notes receivable" (an asset) and loss reserves for future claim payments were unreported. This resulted in the fraudulent overstatement of the financial condition of SIG and its subsidiaries by millions of dollars.

20. Furthermore, subsequent to Beck's termination, PAULUS, BELLEZZA, N. PRUPIS, OLSTEIN, MEZEY, SPARBER, LITTENBERG, SABATO and LIPKIND conspired to loot SIG's insurance subsidiaries and to materially understate the loss reserve liabilities of SIG and its insurance subsidiaries.

21. Securities owned by the SIG insurance subsidiaries were sold and the funds realized from the sale were improperly diverted to SIG by PAULUS, BELLEZZA, N. PRUPIS, OLSTEIN, MEZEY, SPARBER, LITTENBERG,

SABATO and LIPKIND. These funds were then used to make payments of $1 million to BELLEZZA, $1 million to OLSTEIN, $500,000 to the cousin of N. PRUPIS, Stuart Glasser, and over $4 million to make loan payments to First Fidelity Bank for the purpose of reducing the personal liability of BELLEZZA, N. PRUPIS, LIPKIND, PAULUS, SABATO and OLSTEIN. None of these payments were an obligation of the SIG insurance subsidiaries.

22. To cover-up this looting of SIG's insurance subsidiaries, N. PRUPIS, BELLEZZA, PAULUS, SABATO, LIPKIND, OLSTEIN, MEZEY, SPARBER and LITTENBERG further falsified financial reports of SIG's insurance subsidiaries, by causing the SIG subsidiaries to report funds transferred to SIG as a receivable and thus an asset. The receivables were a sham asset because as these defendants well knew, SIG did not have the resources to repay the subsidiaries.

b. Extortion of Contractors

23. In early 1987, R. PRUPIS, N. PRUPIS, LIPKIND, PAULUS, BELLEZZA and PERSHES conspired to create a separate corporation, CPC, in order to cover up an illegal manner of operating SIG. CPC was set up for the purpose of extorting contractors applying for surety bonds from the SIG insurance subsidiaries. This was done by forcing the contractors to pay illegal fees to CPC to qualify for surety bonds, in addition to the surety bond premium payable to the SIG insurance subsidiaries.

24. Contractors seeking bonds from the SIG insurance subsidiaries were threatened that unless they agreed to pay these illegal fees to CPC, the bonds would not be issued. Over one hundred contractors applying for SIG surety bonds were forced to agree to pay fees to CPC. In most cases, the financial condition of these contractors prevented them from obtaining bonds elsewhere. After retaining CPC, when fee payments due to CPC became past due, the contractors would again be threatened by CPC and the SIG insurance subsidiaries that the bonds would cease being issued unless the illegal payments to CPC were made. Some payments were to be received personally by BELLEZZA and PAULUS. Other extortion payments were paid to CPC. BELLEZZA offered several persons at SIG a percentage of the profits for aiding and abetting his successful attempts to extort money from contractors.

25. Victims included, but were not limited to, Constriction Design Real Estate, Inc. ("CDR"), JJW Construction, Inc. ("JJW") Chief, and McKamish Chesapeake, Inc. ("McKamish")

26. The operations of SIG, CDR, JJW, Chief, and McKamish all affect interstate commerce.

27. CDR, JJW, Chief, and McKamish all reasonably believed that BELLEZZA, PAULUS, R. PRUPIS, N. PRUPIS, PERSHES, and LIPKIND had the ability to carry out their threats.

28. Thus, through wrongful use and attempted wrongful use of threatened and actual force and fear, R. PRUPIS, PERSHES, N. PRUPIS, PAULUS, LIPKIND and BELLEZZA maliciously obtained, threatened to obtain,

attempted to obtain and attempted to threaten to obtain the property of contractors seeking bonds from the SIG insurance subsidiaries. These defendants acted with the intent to extort pecuniary advantage and to compel these contractors to make payments to them and otherwise to act against their will. These defendants had the ability to carry out their threats.

29. To prevent this illegal operation from being exposed to the regulatory authorities, R. PRUPIS, PERSHES, N. PRUPIS, PAULUS, LIPKIND and BELLEZZA conspired to fraudulently hide the illegal nature of these CPC operations from BECK and other officers of SIG by withholding and restricting access to this information.

30. The SIG Underwriting Committee was composed of BELLEZZA as Chairman, N. PRUPIS, PAULUS and SPARBER. BELLEZZA used his position as Chairman of the Underwriting Committee to manipulate underwriting requirements to enable him to extort these and other contractors who had applied to the SIG insurance subsidiaries for surety bonds. N. PRUPIS, PAULUS, R. PRUPIS, LIPKIND and PERSHES were also involved in these illegal acts. Every member of the committee, as well as R. PRUPIS, LIPKIND and PERSHES, knew that BELLEZZA was personally receiving profit participations on bonds that the Underwriting committee had approved.

c. Set Aside Fraud

31. BELLEZZA held a financial interest, contrary to federal law, in Aldrich Construction, Inc. ("Aldrich Construction"), a minority company entitled to the set aside of various government funds. To further this financial

interest, BELLEZZA used his position at SIG to cause bonds to be issued to Aldrich Construction, in spite of the fact that Aldrich Constuction [sic] did not financially qualify for these bonds.

d. Fraudulent Promises to Indemnify

32. To secure the release of bonds for several contractors, BELLEZZA agreed to personally sign agreements to indemnify the SIG insurance subsidiaries for claims and losses on the bonds. At the time BELLEZZA agreed to sign the agreements, he had no intention of doing so. Some of these bonds resulted in claims against the SIG insurance subsidiaries. BELLEZZA later refused to sign the promised general indemnity agreements, which resulted in SIG losses. R. PRUPIS, N. PRUPIS, SPARBER, PAULUS and LIPKIND authorized and ratified BELLEZZA's fraudulent promises. These fraudulent promises to indemnify included, but were not limited to, indemnification agreements with JJW, Aldrich Construction and Chief.

e. Compensation Committee Abuses

33. The Compensation Committee was composed of SABATO as Chairman, BELLEZZA, R. PRUPIS, OLSTEIN and PAULUS. The compensation committee authorized, ratified, ordered and directed payment of numerous salaries and benefits for services that were never rendered, that were unnecessary, and that did not warrant the grossly inflated salaries and benefits paid. The Compensation Committee caused these salaries and benefits to be

paid to cronies and relatives and to others to purchase the loyalty, silence and cooperation of employees who had knowledge of the Senior Officers' and Directors' improper activities, including, without limitation, the improper activities alleged herein. Among those receiving these excessive and unnecessary salaries and benefits were Richard Petigrow, PERSHES, Dennis Megdal, Scott Krantz, Robert Ellenport, Valerie Belleza, Judy Weaver, Wayne Africh, Frank Schembre, Patrick Del Mastro and Jane Hall.

f. Improper and Unnecessary Legal Fees

34. LIPKIND and N. PRUPIS misused their positions as senior officers, directors and as General Counsel to profiteer by causing SIG to retain their law firm, Lampf, Lipkind, Prupis & Petigrow ("Lampf, Lipkind"), for legal services that were unnecessary and at billing rates that were excessive, and further deprived SIG of representation by independent counsel. LIPKIND and N. PRUPIS caused SIG to be given legal advice which was calculated to benefit Lampf, Lipkind first, then R. PRUPIS, and then SIG. Lampf, Lipkind's excessive billings were not subjected to any effective review ($815,876 paid to Lampf, Lipkind in 1986 and 1987), as all bills were approved by the General Counsel's brother, R. PRUPIS.

35. On or about October 26, 1987, N. PRUPIS and LIPKIND used their position as General Counsel to knowingly give blatantly incorrect legal advice to BECK concerning an option resolution, to influence the vote of the Board of Directors on a resolution in which N. PRUPIS and LIPKIND had a substantial personal interest.

g. Attempted Options Fraud

36. R. PRUPIS, BELLEZZA, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, MEZEY, SPARBER and LITTENBERG attempted to provide options to purchase SIG stock to certain individuals. This resolution would have resulted in a massive shift of shareholder's equity from all of the shareholders to only a few, who also were senior officers and directors of SIG. This was prevented principally due to the acts and protestations of BECK.

h. Other Abuses

37. The Senior Officers and Directors caused SIG to pay excessive travel and entertainment expenses for themselves and their spouses, including payments to a limousine company in which N. PRUPIS, LIPKIND and other Lampf, Lipkind partners held a financial interest.

38. Over $318,000 was spent on luxury automobiles for certain persons at SIG.

39. R. PRUPIS and others who were exercising control over underwriting and claims, accepted gifts from client contractors and their agents and in some instances eased conditions imposed on those contractors by SIG. These gifts included items valued in excess of $1,000.

40. R. PRUPIS and others conspired with a representative of an insurance ageny, [sic] Sun State Insurance Agencies, Inc. ("Sun State"), to defraud Sun State by withholding $137,874 of commissions that should have been paid to Sun State. At R. PRUPIS' direction, these

funds were diverted by SIG to a new entity, later established by the representative.

41. SIG gave and held mortgages for certain senior officers and directors. R. PRUPIS sold his condominium to SIG without Board approval.

B. RACKETEERING ACTIVITY DIRECTED AGAINST BECK

42. The defendants, through their scheme and artifice, directly injured BECK and caused him to suffer damages, as set out more fully below.

a. Termination "For Cause"

43. BECK first became associated with SIG on August 22, 1983, pursuant to an Employment Agreement, in the position of President and Director of SIG. This Employment Agreement was for a period of five years. A later Employment Agreement (attached as Exhibit "A") resulted in an eight year extension of BECK's employment beyond the 1983 Employment Agreement.

44. Throughout the course of his employment with SIG, BECK sought to maintain a professional attitude; observe the insurance industry standards for ethics and legality; cooperate with regulators consistent with his responsibility as a Director and President; and generally to maintain throughout SIG a high degree of compliance with those obligations of the company to its shareholders, its clients, the industry and to conduct the business of SIG in a manner consistent with proper management.

45. At various times during his employment, BECK became aware of activities by the officers and directors and employees of SIG which were inconsistent with industry standards for proper management in the operation of SIG and, in many cases, violated various insurance regulations and criminal statutes. He immediately brought these problems to the attention of appropriate persons at SIG, including R. PRUPIS, N. PRUPIS, LIPKIND, BELLEZZA, PAULUS, MEZEY, OLSTEIN and others, as well as various government regulators. On some occasions, the problems were corrected. In other instances, the Senior Officers and Directors resisted BECK, despite the impropriety of the actions, overruled Beck and discouraged him and prevented him from further pursuing these problems.

46. Beginning in or around August 1986, the Senior Officers and Directors began to "neutralize" BECK in order to inhibit BECK's authority and power to prevent and correct abuses by the Senior Officers and Directors and others for their personal benefit and to the detriment of SIG, its shareholders and its creditors, while at the same time preventing BECK from becoming aware of other abuses and other criminal activities of the Senior Officers and Directors.

47. Despite the actions of the Senior Officers and Directors, BECK continued to object to improprieties. BECK was in a position to expose their misconduct and was therefore a threat to their continued improper management of SIG for their personal benefit.

48. On or about April 11, 1988, the Senior Officers and Directors began to realize that influential and knowledgeable outside parties were starting to scrutinize their activities. They began to realize that if they continued on their present course of dealing with SIG, using the corporation as if it were their own personal pocketbook, they would face potential liability with the insurance regulators, shareholders, and Securities and Exchange Commission, as well as potential criminal liability.

49. For example, BECK was contacted by phone by Donald Hartsfield, Director of Insurance Company Regulations, Florida Department of Insurance, on May 5, 1988. BECK was asked if R. PRUPIS was going to be terminated, and if the company had understated its loss reserves by $1 million or more. BECK reported to Hartsfield that it appeared that the company had understated the loss reserves by an amount in excess of $1 million. BECK also told him that Deloitte, Haskins & Sells was currently looking into the question of the understatement of loss reserves, and should have an answer in about a week. This conversation was immediately reported by BECK to BELLEZZA. BELLEZZA informed BECK that he did not like the fact that BECK had told the truth to the Department of Insurance, and in the future he was not to talk to any regulators unless another director was present. BECK told BELLEZZA that he "would have no part in putting out false financial information." BECK also told BELLEZZA that he "would rather see the company go belly up than to be involved in the falsification of financial data."

50. Thus, the Senior Officers and Directors were especially concerned about BECK revealing their misdeeds and, therefore, wanted to terminate his employment with SIG. Because of the Employment Agreement, however, the directors could not terminate BECK without cause, without the enterprise incurring substantial liability for money damages for breach of contract.

51. Consequently, the Senior Officers and Directors engaged in systematic efforts to fraudulently create causes for BECK's termination, by portraying BECK as an ineffective officer, by holding him responsible for actions of irresponsible management over which he had no authority or control, and by holding him accountable for failures of senior management despite the fact that they were outside his area of responsibility. These baseless accusations were made in order to improperly substantiate a termination for cause and to shift the blame for the Senior Officers' and Directors' illegal conduct. BECK would no longer be able to report improper activities, and, moreover, could be used as a scapegoat for whatever illegal activities came to light.

52. In order to accomplish this, the Senior Officers and Directors engaged in a conspiracy which included FIREMARK. They conspired to have FIREMARK write a false and misleading report on "the problems at SIG" (the "FIREMARK report," a copy of which is attached as Exhibit "B"), blaming BECK for the improper activities and their consequences which they well knew were not his responsibility and could not be attributed to him.

53. The Senior Officers and Directors knew and intended that any reader of the report would come to the

incorrect conclusion that the charges of mismanagement revealed in the FIREMARK report were BECK's fault.

54. The Senior Officers and Directors fraudulently created causes for BECK's termination and thereby prevented BECK from exposing the wrongs which occurred at SIG and discredited BECK so that no one would believe BECK'S charges.

55. BELLEZZA, R. PRUPIS, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, MEZEY, SPARBER and LITTENBERG terminated Beck for false and fraudulently created "causes" which included, but were not limited to, racism, instigation of charges of sexual harassment, dishonesty, unauthorized release of information to the regulators, incompetence, misstatement of financial information, failure to disclose information to the Board of Directors, failure to control actions of R. PRUPIS and others, failure to control travel and entertainment expenses, failure to control SIG spending, extortion of fees from contractors, embezzlement of funds, accepting gifts and monies from contractors, accepting kickbacks from vendors, use of drugs, abuse of expense accounts, lack of general management ability, sharing proceeds of claim payments with claimants, lack of concern for SIG's money, alteration of accounting records, and withholding knowledge of claims and losses.

56. In response to all of these false and fraudulent charges, BECK maintained and still maintains that he was entirely innocent.

57. Citing these false and fraudulently created causes, BELLEZZA, LIPKIND, N. PRUPIS, SABATO,

PAULUS, OLSTEIN, MEZEY, SPARBER and LITTENBERG caused BECK to be officially notified of his permanent dismissal from SIG by letter on May 17, 1988 (Exhibit "C").

58. BECK never consented to either his removal or termination.

59. As a result of this fraudulent conduct of the Senior Officers and Directors, BECK has been injured in that he has been deprived of the money due and owing to him under his employment contract with SIG.

60. As a further result, BECK has been forced to hire attorneys and expend considerable attorney's fees.

b. Personal Guarantees

61. As detailed in paragraphs 18 and 19, R. PRUPIS, N. PRUPIS, PERSHES, PAULUS, LIPKIND and BELLEZZA, acting individually and in concert with each other and others, falsified SIG records and financial statements, resulting in a material overstatement of the shareholders' equity and net income of SIG and its subsidiaries.

62. BELLEZZA, R. PRUPIS, N. PRUPIS, PAULUS, LIPKIND, MEZEY, PERSHES and SPARBER all knew of these falsifications at the time they were made, and each of them consented to and ratified the making of these falsifications.

63. In or around November and December of 1987, BELLEZZA and N. PRUPIS, acting in concert with R. PRUPIS, PAULUS, LIPKIND, MEZEY, PERSHES and

SPARBER, applied, on behalf of SIG, for a $7.5 million loan from First Fidelity Bank. In their application for this loan, these defendants utilized the fraudulently created financial statements and fraudulently created financial estimates, all of which greatly overstated the financial condition of SIG and its subsidiaries.

64. This loan was to provide interim capital for a SIG subsidiary, bridging a planned securities offering, which would, in turn, allow SIG to issue more bonds to a wider group of contractors. The loan thus was designed to allow the Senior Officers and Directors to broaden the base of their illegal conduct.

65. The Senior Officers and Directors sought to have BECK, who was then still the president of SIG, personally guarantee the loan.

66. To induce BECK to enter into this personal guarantee, the Senior Officers and Directors, through false and misleading statements and omissions, caused BECK to believe that his employment contract would continue to be honored. However, the Senior Officers and Directors had no intention of honoring BECK's contract as they had already embarked on their criminal schemes and their associated scheme of creating fraudulent causes for BECK's termination and creating a scapegoat for their illegal conduct so that they could continue their racketeering activity.

67. To further induce BECK to enter into this personal guarantee, the Senior Officers and Directors, utilizing the fraudulent financial information, caused BECK to believe that SIG was in a much better financial position than it actually was.

68. Relying on the fraudulent financial information and the representations that BECK's employment status would remain unchanged, BECK executed a personal guarantee agreement with First Fidelity Bank (Exhibit "D") BECK's reliance was reasonable.

69. Had BECK known of the true financial condition of SIG and its subsidiaries or of the illegal manner in which the Senior Officers and Directors were operating SIG or of the Senior Officers' and Directors' plans to fraudulently create causes for BECK's termination, BECK would not have personally guaranteed the First Fidelity Bank loan.

70. The looting of SIG and its subsidiaries by the Senior Officers and Directors, as more fully detailed in paragraphs 11 to 41, resulted in SIG defaulting on the First Fidelity Bank loan.

71. Furthermore, on or about December 30, 1987, SIG pledged shares of common stock of the SIG subsidiaries as collateral for this First Fidelity Bank loan. As a result of the illegal conduct of the Senior Officers and Directors, this collateral became worthless. If not for this looting and profiteering, the collateral would have been sufficient to satisfy the loan. Because the collateral is now worthless, however, BECK's personal guarantee has been triggered.

72. First Fidelity Bank has sued BECK based on his personal guarantee which the above-named parties fraudulently induced BECK to execute.

73. BECK has been forced to hire attorneys in defense of this suit by First Fidelity Bank and has expended considerable attorney's fees.

c. <u>Unsecured Loan</u>

74. On or about August 11, 1986, BECK made an unsecured loan to SIG in the amount of $150,000.

75. To induce BECK to extend this loan, BELLEZZA, N. PRUPIS, LIPKIND, PAULUS, SPARBER, OLSTEIN, MEZEY and R. PRUPIS, through false and misleading statements and omissions, caused BECK to believe that his employment contract would continue to be honored. However, these defendants had no intention of honoring BECK's contract as they had already embarked on their criminal schemes and their associated scheme of creating fraudulent causes for BECK's termination and creating a scapegoat for their illegal conduct so that they could continue their racketeering activity.

76. Had BECK known of these defendants' and others' plans to fraudulently create causes for BECK's termination, and of their racketeering activity, BECK would not have extended this loan to SIG.

77. As a result of the illegal conduct of the Senior Officers and Directors, more fully detailed in paragraphs 11 to 41, SIG became unable to honor its obligation to repay the loan. BECK was thus directly injured by the illegal looting and profiteering.

78. As a further result, BECK has been forced to hire attorneys and expend considerable attorney's fees.

d. Predicate Acts

79. In December of 1987, R. PRUPIS caused the life insurance application for Allen Aldrich, the president of Aldrich Construction, to be mailed from SIG to the insurer in California.

80. In or around December of 1987, Allen Aldrich signed and mailed the life application and his check to SIG from New Jersey to Florida.

81. Shortly thereafter, SIG mailed Mr. Aldrich's life application and his check to the life insurance company in California.

82. In or around April of 1988, the life insurance company mailed the life insurance policy insuring Mr. Aldrich to SIG from California to Florida.

83. Shortly thereafter, SIG mailed a copy of the life insurance policy to BELLEZZA.

84. On or about June 22, 1988, N. PRUPIS mailed Linda Burton a letter from New Jersey to Florida in which he requested her to sign a statement which he knew to be false, stating that she had never told anyone that the McKamish bonds had been approved by SIG's Board.

85. On or about November 11, 1988, ID&T Drywall, Inc. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

86. On or about November 11, 1988, All Bright Electric, Inc. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was

threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

87. On or about November 11, 1988, Shoemaker Plumbing Co. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

88. On or about November 11, 1988, SCR Drywall, Inc. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

89. On or about December 20, 1988, C.I.P.I. Corp. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

90. On or about December 20, 1988, Agmilu & Co. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

91. On or about December 20, 1988, Ahmad Construction Co. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

92. On or about December 20, 1988, AAV Construction Co. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was

threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

93. On or about December 20, 1988, Dale Construction Co. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

94. In or around April of 1986, BELLEZZA contacted Linda Burton via telephone in Florida from New Jersey, and told her to issue bonds for Aldrich Construction, stating that he would be financially responsible for any losses resulting from the bonds.

95. In 1987, BELLEZZA from New Jersey telephoned R. PRUPIS in Florida, and discussed lending R. PRUPIS the money to pay off the loan on R. PRUPIS' condominium to SIG.

96. Also in 1987, BELLEZZA wired $75,000 from New Jersey to Capital Bank for R. PRUPIS.

97. In or around May of 1987, BELLEZZA telephoned Linda Burton in Florida from New Jersey, to discuss the fee amounts which JJW would pay.

98. In or around July of 1987, BELLEZZA and Walsh had a telephone conversation (New Jersey to Florida) in which they discussed the fee which would be payable by JJW to CPC, in addition to the bond premium, to enable JJW to secure the Wellesley Inn Miami Lakes bond.

99. In or around July of 1987, BELLEZZA, from New Jersey, called Terry Westling, in Florida, and told her to work with his New Jersey attorney, Elliot Kramer of

Lampf, Lipkind, to draft the new agreement for execution by JJW.

100. In or around July of 1987, Ms. Westling telecopied copies of the original agreement to Kramer in New Jersey.

101. In or around July of 1987, Mr. Kramer amended the original agreement, and on or about that same day telecopied the draft back to Ms. Westling in Florida.

102. In or around July of 1987, Ms. Westling had the draft retyped, and telecopied copies to BELLEZZA and Kramer for their approval.

103. In or around July of 1987, Mr. Kramer told Ms. Westling over the telephone (New Jersey to Florida) that the newly drafted agreements were correct.

104. In or around July of 1987, BELLEZZA directed Ms. Westling via telephone, from New Jersey to Florida, to call Walsh and tell him that he could come to the CPC office and execute the agreement.

105. In or around September of 1987, Linda Burton, from Florida, informed BELLEZZA, in New Jersey, via telephone, that she needed his signature on the JJW general indemnity agreement.

106. In or around September of 1987, BELLEZZA, in New Jersey, discussed with R. PRUPIS, in Florida, via telephone, the terms of the September 10, 1987 agreement with Chief and the terms of BELLEZZA's agreement to indemnify Chief.

107. On or about September 21, 1987, BELLEZZA sent R. PRUPIS by telecopy, from New Jersey to Florida, a

copy of material prepared by Smith Barney to value SIG securities for a debt to equity exchange offering.

108. On or about December 8, 1987, N. PRUPIS, from New Jersey, telephoned Lynn Day, in Florida, and directed him to telecopy SIG's financial estimates for December 31, 1987. These estimates contained the fraudulent financial information described in paragraphs 18 and 19.

109. On or about December 8, 1987, Lynn Day, as directed, telecopied, from Florida, the financial estimates to N. PRUPIS in New Jersey.

110. In or around December of 1987, BELLEZZA from New Jersey, told Linda Burton, in Florida, via telephone, that he would post a $100,000 letter of credit to satisfy the requirements of a contractor that had applied for bonds to SIG, Cox & Palmer, Inc., for a fee to BELLEZZA, personally, of $40,000.

111. In or around December of 1987, R. PRUPIS, in Florida, and N. PRUPIS, in New Jersey, spoke via telephone regarding the First Fidelity Bank loan and the personal guarantees.

112. In 1987 and until May of 1988, unnecessary limousine reservations were made via telephone calls from Florida for SIG personnel traveling to New Jersey. Teresa Waldron, acting at the direction of N. PRUPIS and R. PRUPIS, made at least one of these reservations with Livingston Five Star Limousine.

113. In or around January of 1988, N. PRUPIS and BELLEZZA, from New Jersey, telephoned R. PRUPIS, in Florida, and discussed and approved the sale of R.

PRUPIS' house to Linda Burton, with the accompanying mortgage from SIG.

114. All Aldrich bonds were approved via telephone or telecopy by BELLEZZA in New Jersey to SIG employees in Florida, including BELLEZZA's approval on the Aldrich bond to the County of Essex, New Jersey on or about February 24, 1988.

115. In or around February of 1988, BELLEZZA, in New Jersey, instructed Theresa Westling, in Florida, via the telephone, to get Valerie Bellezza's check out.

116. In or around April of 1988, BELLEZZA, from New Jersey, instructed Linda Burton, in Florida, via the telephone, that the McKamish bonds were to be approved, but he wanted a "piece of the action."

117. In or around April of 1988, BELLEZZA approved the McKamish bonds in a telephone conversations [sic] from New Jersey to Linda Burton, in Florida.

118. In or around April of 1988, PAULUS approved the McKamish bonds in a telephone conversations [sic] from New Jersey to Linda Burton, in Florida.

119. On or about April 18, 1988, Carl Shible, in Florida, received a telephone call from MEZEY, in New Jersey, who told Shible that the New Jersey directors had been meeting without N. PRUPIS and discussing the excessive spending of R. PRUPIS.

120. On or about April 18, 1988, Shible, in Florida, received a telephone call from OLSTEIN, in New Jersey, who told Shible that the New Jersey directors had been meeting without N. PRUPIS and discussing the excessive spending of R. PRUPIS.

121. On or about April 19, 1988, Shible, in Florida, received a telephone call from MEZEY, from New Jersey. MEZEY told Shible that BELLEZZA and PAULUS wanted to tell N. PRUPIS that they were concerned about the activities of R. PRUPIS. MEZEY asked Shible to ask BECK if Robert A. Beck, Sr. would serve on the Board. All of these phone calls to Shible described in paragraphs 119 to 121 were designed to fraudulently lead Shible and Beck to believe that the improper activity at SIG would be corrected.

122. On or about April 21, 1988, BECK and Shible, from Florida, talked by telephone with MEZEY, in New Jersey. MEZEY told BECK and Shible that at the recent directors meeting, it had been decided to engage a consulting firm to examine the operations of SIG.

123. On or about May 1, 1988, BELLEZZA, in New Jersey, telephoned BECK, in Florida. BELLEZZA told BECK that he had become convinced that R. PRUPIS should be removed from his position and asked BECK to keep things calm for the next two weeks. BELLEZZA thus fraudulently led BECK to believe that the improper activities at SIG would be corrected and that BECK would remain. This was done in an attempt to prevent BECK from talking to the authorities or the press, until he could be discredited and neutralized.

124. In or around June of 1988, N. PRUPIS, from New Jersey, called Linda Burton, in Florida, and asked her to sign a false statement addressed to LIPKIND to the effect that the directors had not approved the McKamish bond request. In fact, BELLEZZA and PAULUS had approved the request. This request was part of an effort

to cover up BELLEZZA's manipulation of underwriting requirements to extort money from contractors seeking bonds from the SIG insurance subsidiaries.

125. From in or around December of 1987 until in or around July of 1988, BELLEZZA, R. PRUPIS, and PERSHES extorted CDR.

126. From in or around May of 1987 until in or around the fall of 1988, BELLEZZA, PAULUS, R. PRUPIS, N. PRUPIS, PERSHES and LIPKIND extorted JJW.

127. From in or around the summer of 1987 until in or around July of 1988, BELLEZZA, PAULUS, R. PRUPIS, N. PRUPIS, and PERSHES extorted Chief.

128. In or around the spring of 1988, BELLEZZA, PAULUS, R. PRUPIS, N. PRUPIS, PERSHES and LIPKIND extorted McKamish.

COUNT I

VIOLATION OF 18 U.S.C. §1962(c) BY R. PRUPIS, BELLEZZA, PERSHES, SPARBER, LIPIUND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, MEZEY and LITTENBERG

129. The allegations of paragraphs 1 through 128 are realleged and reaverred as though more fully set forth herein.

130. R. PRUPIS, BELLEZZA, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, MEZEY, PERSHES, and LITTENBERG committed the above-described indictable racketeering acts – mail fraud, wire fraud and extortion – all of which constitute "racketeering activity" within the definition of 18 U.S.C. § 1961(1).

131. All of these racketeering acts occurred within 10 years of each other.

132. The multiple acts of racketeering activity by the Senior Officers and Directors were interrelated, formed part of a common and continuous pattern of fraudulent schemes, were perpetrated with the same or similar intent, were committed by the same or similar methods, and had the same or similar victims. These activities were not isolated incidents and, collectively, constitute a "pattern of racketeering activity" as defined in 18 U.S.C. § 1961(5).

133. By committing and agreeing to commit, over a period of less than 10 years, two or more acts of mail fraud, wire fraud, and extortion, as set forth in paragraphs 11 to 128, all in furtherance of a scheme and artifice to defraud BECK, SIG shareholders and creditors, regulators and other entities and persons, R. PRUPIS, BELLEZZA, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, MEZEY, PERSHES and LITTENBERG have engaged, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).

134. By reason of R. PRUPIS', BELLEZZA's, SPARBER's, LIPKIND's, N. PRUPISI, SABATO's, PAULUS', OLSTEIN's, MEZEY's, PERSHES' and LITTENBERG's violations of 18 U.S.C. § 1962(c), BECK has been injured in his business and property, as more fully set forth in paragraphs 42 through 78.

135. As a result of the Senior Officers' and Directors' racketeering activity, BECK has been forced to retain attorneys and expend considerable attorney's fees.

WHEREFORE, BECK demands three times the damages he has sustained, the costs of this litigation, including reasonable attorneys' fees, and any other relief this Court deems just.

COUNT II

VIOLATION OF §1962(a) BY PERSHES R. PRUPIS, BELLEZZA, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, MEZEY AND LITTENBERG

136. The allegations of paragraphs 1 through 132 and 135 are realleged and reaverred as though more fully set forth herein.

137. R. PRUPIS, BELLEZZA, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, MEZEY, PERSHES and LITTENBERG have received income derived directly and indirectly from the pattern of racketeering activity described in paragraphs 11 to 128, in that each received salaries, dividends, commissions and other fees as a result of their participation in the racketeering activity. Each used or invested, directly and indirectly, all or a part of that income, and the proceeds of that income to establish and operate their enterprise.

138. By reason of R. PRUPIS', BELLEZZA's, SPARBER's, LIPKIND's, N. PRUPISI, SABATO's, PAULUS', OLSTEIN's, MEZEY's, PERSHES' and LITTENBERG's violations of 18 U.S.C. § 1962(a), BECK has been injured in his business and property, as more fully set forth in paragraphs 42 through 78.

WHEREFORE, BECK demands three times the damages he has sustained, the costs of this litigation, including reasonable attorneys' fees, and any other relief this Court deems just.

COUNT III

VIOLATION OF §1962(b) BY PERSHES, R. PRUPIS, BELLEZZA, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, MEZEY AND LITTENBERG

139. The allegations of paragraphs 1 through 132 and 135 are realleged and reaverred as though more fully set forth herein.

140. Through the pattern of criminal activity described in paragraphs 11 to 128, R. PRUPIS, BELLEZZA, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, MEZEY, PERSHES and LITTENBERG acquired and maintained, directly and indirectly, an interest in and control of their enterprise.

141. By reason of R. PRUPIS', BELLEZZA's, SPARBER's, LIPKIND's, N. PRUPIS', SABATO's, PAULUS', OLSTEIN's, MEZEY's, PERSHES' and LITTENBERG's violations of 18 U.S.C. § 1962(b), BECK has been injured in his business and property, as more fully set forth in paragraphs 42 through 78.

WHEREFORE, BECK demands three times the damages he has sustained, the costs of this litigation, including reasonable attorneys' fees, and any other relief this Court deems just.

COUNT IV

VIOLATION OF §1962(d) BY R. PRUPIS, PERSHES, BELLEZZA, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, MEZEY, LITTENBERG AND FIREMARK

142. The allegations of paragraphs 1 through 141 are realleged and reaverred as though more fully set forth herein.

143. R. PRUPIS, BELLEZZA, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, MEZEY, LITTENBERG, PERSHES and FIREMARK agreed and conspired among themselves and with others to engage, directly or indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity; to use income or the proceeds of income derived from the pattern of racketeering activity to establish and operate the enterprise; and to acquire and maintain an interest in and control of the enterprise. By so conspiring, each of these persons violated § 1962(d).

144. BECK's termination and/or the fraudulent creation of causes were overt acts done pursuant to the racketeering conspiracy of R. PRUPIS, BELLEZZA, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, PERSHES, MEZEY, LITTENBERG and FIREMARK.

145. Furthermore, by reason of R. PRUPIS', BELLEZZA's, SPARBER's, LIPKIND's, N. PRUPIS', SABATO's, PAULUS', OLSTEIN's, MEZEY's, PERSHES' and LITTENBERG's violations of § 1962(d), BECK has been injured in his business and property, as more fully set forth in paragraphs 42 through 78.

WHEREFORE, BECK demands three times the damages he has sustained, the costs of this litigation, including reasonable attorneys' fees, and any other relief this Court deems just.

COUNT V

COMMON LAW FRAUD BY R. PRUPIS, BELLEZZA, PERSHES, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, MEZEY, LITTENBERG AND FIREMARK

146. The allegations of paragraphs 1 through 78 are realleged and reaverred as though more fully set forth herein.

147. BECK was deprived of the earnings which were due him under his employment contract due to the fraudulent misrepresentations of R. PRUPIS, BELLEZZA, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, PERSHES, MEZEY, LITTENBERG and FIREMARK.

148. These persons knew that these representations were false and that their omissions were materially misleading at the time of making them. They intended BECK and others to rely on these misrepresentations and omissions. The reliance on these misrepresentations was reasonable and justifiable under the circumstances.

149. All of the misrepresentations and nondisclosures were material.

150. As a direct and proximate result of the foregoing, BECK has been severely injured.

151. The frauds perpetrated were committed in an outrageous manner and with malice or reckless indifference toward BECK's rights.

WHEREFORE, BECK demands judgment for the damages he has sustained, the costs of this litigation, including reasonable attorneys' fees, punitive damages and any other relief this Court deems just.

COUNT VI

NEGLIGENCE BY R. PRUPIS, BELLEZZA, PERSHES, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, MEZEY, LITTENBERG AND FIREMARK

152. The allegations of paragraphs 1 through 78 and 147 through 150 are realleged and reaverred as though more fully set forth herein.

153. BECK was deprived of the earnings which were due him under his employment contract due to the negligent misrepresentations of R. PRUPIS, BELLEZZA, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, PERSHES, MEZEY, LITTENBERG and FIREMARK. These persons knew or should have known or were negligent in not knowing that these representations were false.

WHEREFORE, BECK demands judgment for the damages he has sustained, the costs of this litigation, and any other relief this Court deems just.

COUNT VII

FRAUDULENT INDUCEMENT BY R. PRUPIS, BELLEZZA, PERSHES, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, MEZEY and LITTENBERG

154. The allegations of paragraphs 1 through 78 are realleged and reaverred as though more fully set forth herein.

155. As a result of the fraudulent misrepresentations of R. PRUPIS, BELLEZZA, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, PERSHES, MEZEY, and LITTENBERG, acting individually and in concert with each other and others, BECK was fraudulently induced to enter into the First Fidelity Bank loan guarantee.

156. These persons knew that these representations were false and that their omissions were materially misleading at the time of making them. They intended BECK and others to rely on these misrepresentations and omissions. The reliance on these misrepresentations was reasonable and justifiable under the circumstances.

157. All of the misrepresentations and nondisclosures were material.

158. As a direct and proximate result of the foregoing, BECK has been severely injured.

159. The frauds perpetrated were committed in an outrageous manner and with malice or reckless indifference toward BECK's rights.

WHEREFORE, BECK demands judgment for the damages he has sustained, the costs of this litigation,

including reasonable attorneys' fees, punitive damages and any other relief this Court deems just.

COUNT VIII

NEGLIGENCE BY R. PRUPIS, BELLEZZA, PERSHES, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, MEZEY and LITTENBERG

160. The allegations of paragraphs 1 through 78 and 155 through 158 are realleged and reaverred as though more fully set forth herein.

161. As a result of the negligent misrepresentations of R. PRUPIS, BELLEZZA, SPARBER, LIPKIND, N. PRUPIS, SABATO, PAULUS, OLSTEIN, PERSHES, MEZEY, and LITTENBERG, acting individually and in concert with each other and others, BECK was induced to enter into the First Fidelity Bank loan guarantee. These individuals knew or should have known or were negligent in not knowing that these representations which they had made were false.

WHEREFORE, BECK demands judgment for the damages he has sustained, the costs of this litigation, and any other relief this Court deems just.

COUNT IX

FRAUD BY R. PRUPIS, BELLEZZA, MEZEY, LIPKIND, OLSTEIN, SPARBER, N. PRUPIS, and PAULUS

162. The allegations of paragraphs 1 through 78 are realleged and reaverred as though more fully set forth herein.

163. As a result of the fraudulent misrepresentations of R. PRUPIS, BELLEZZA, MEZEY, LIPKIND, OLSTEIN, SPARBER, N. PRUPIS, and PAULUS, acting individually and in concert with each other and others, BECK was fraudulently induced to extend the $150,000 loan to SIG.

164. These defendants knew that these representations were false and that their omissions were materially misleading at the time of making them. They intended BECK and others to rely on these misrepresentations and omissions. The reliance on these misrepresentations was reasonable and justifiable under the circumstances.

165. All of the misrepresentations and disclosures were material.

166. As a direct and proximate result of the foregoing, BECK has been severely injured.

167. Furthermore, the looting and racketeering of the Senior Officers and Directors prevented SIG from repaying its loan.

168. The frauds perpetrated were committed in an outrageous manner and with malice or reckless indifference toward BECK's rights.

WHEREFORE, BECK demands judgment for the damages he has sustained, the costs of this litigation, including reasonable attorneys' fees, punitive damages and any other relief this Court deems just.

COUNT X

NEGLIGENCE BY R. PRUPIS, BELLEZZA, MEZEY, LIPKIND, OLSTEIN, SPARBER, N. PRUPIS, and PAULUS

169. The allegations of paragraphs 1 through 78 and 163 through 167 are realleged and reaverred as though more fully set forth herein.

170. As a result of the negligent misrepresentations of R. PRUPIS, BELLEZZA, SPARBER, LIPKIND, N. PRUPIS, PAULUS, OLSTEIN, and MEZEY, acting individually and in concert with each other and others, BECK was induced to extend the $150,000 loan to SIG. These individuals knew or should have known or were negligent in not knowing that these representations which they had made were false.

WHEREFORE, BECK demands judgment for the damages he has sustained, the costs of this litigation, and any other relief this Court deems just.

DEMAND FOR JURY TRIAL

ROBERT A. BECK, II, demands jury trial as to all issues so triable as of right by jury.

Respectfully submitted,

STEEL HECTOR & DAVIS
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By: Jules L. Rossi
Jules L. Rossi

VERIFICATION

I ROBERT A. BECK, II, verify that the allegations contained in this Crossclaim and Third Party Claim are true to the best of my knowledge

/s/ Robert A. Beck – II
ROBERT A. BECK – II

ACKNOWLEDGEMENT

STATE OF FLORIDA) ss

COUNTY OF BROWARD) ss

I HEREBY CERTIFY that on this day, before me, an officer duly authorized to take acknowledgements, personally appeared ROBERT A. BECK, II, to me known to be the person described in and who executed the foregoing instrument, and acknowledging before me that he executed the same.

WITNESS my hand and official seal in the County and State last aforesaid this 28th day of May 1990

/s/ (signature of notary)

My Commission Expires: NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. DEC. 18, 1992
BONDED THRU GENERAL INS. UNO.

EXHIBIT A

EMPLOYMENT AGREEMENT

Agreement made this 28th day of June, 1986 by and between ROBERT A. BECK, II, residing at 18201 Daybreak Drive, Boca Raton, Florida 33434 ("Employee") and SOUTHEASTERN INSURANCE GROUP, INCORPORATED, a Florida corporation having its principal office at 1620 West Oakland Park Boulevard, Suite 200, Fort Lauderdale, Florida (the "Employer").

RECITALS

WHEREAS, Employee is a Director and President of Employer; and

WHEREAS, Employee owns more than twenty (20%) percent of the Class A Voting Stock of the Employer, which class of stock presently enjoys the power to elect five of the seven directors of the Employer; and

WHEREAS, the parties have an existing employment relationship and desire to make certain modifications to same, and to set forth the terms of their employment relationship herein.

NOW, THEREFORE, in consideration of the mutual promises and covenants herein contained, the parties agree as follows:

1. *Employment.* Employer hereby employs Employee and Employee hereby accepts employment from Employer to serve as President of Employer pursuant to the terms and conditions of this Agreement.

2. *Term. The term of employment shall commence on the Effective Date and end on the fifth (5th) anniversary thereof, unless sooner terminated pursuant to the provisions of Section 7.1 hereof; PROVIDED, HOWEVER, that unless this Agreement has been earlier terminated as provided in Section 7.1 hereof, the Employee shall have the right upon written notice to the Employer given not more than twelve (12) months nor less than six (6) months prior to the fifth anniversary of the Effective Date to extend this Agreement for an additional period of five (5) years commencing on the fifth (5th) anniversary of the Effective Date.*

3. *Duties, Extent of Services and Restrictions.*

3.1 Except as otherwise specifically permitted by Section 3.3 hereof, the Employee shall devote his entire business time, attention and energies to the business of the Employer. The Employee shall have the following duties:

(a) The primary responsibility for the duties of the office of President as set forth in the By-laws of Employer, the development and preparation of the budgets and financial forecasts of the Employer, the monitoring of the financial performance of the Employer, the licensing of Employer's subsidiaries in various jurisdictions and the compliance by Employer and its subsidiaries of all material laws, rules and regulations affecting its and their business; and

(b) The performance of such other, additional and/or different reasonable duties as shall be assigned or delegated to him by the Directors of the Employer.

3.2 During the term of this Agreement and in the performance of his duties hereunder, the Employee shall:

(a) Abide by the reasonable rules and regulations of the Employer as established from time to time by the Directors of the Employer;

(b) Obey all requirements and provisions of the By-laws of the Employer adopted as of the Effective Date and all other reasonable requirements and provisions of By-laws of the Employer adopted subsequent to the Effective Date; and

(c) Not violate the provisions of Article 8 of this Agreement.

3.3 During the term of this Agreement, the Employee may engage in business activities other than as an employee of the Employer if, but only if, he complies in full with the following terms and conditions:

(a) Such other business activity does not cause any conflicts or potential conflicts with the business of the Employer or the Employee's duties hereunder;

(b) Such other business activity does not involve any material time effort on the part of the Employee;

(c) Such other business activity does not involve any corporate opportunity of the Employer (unless the Employer, by its Board of Director, shall in writing waive same); and

(d) The Employee has obtained the prior written consent of the Board of Directors of the Employer for such other business activity.

3.4 Section 3.3 shall not be construed as preventing the Employee from investing his assets in such form or manner as will not require any time or services on his part in the operation of the affairs of the entities in which such investments are made.

3.5 In the event that the Employee is engaged in a business activity with the approval of the Employer, in accordance with the provisions of Section 3.3 hereof, and at any time after the commencement of such engagement, a conflict or potential conflict should arise between such business activity, and the Employer or the Employee's duties hereunder, or if for some other reasons which are in the best interests of the Employer (*i.e.*, the Employee is devoting more time to such other business activity than originally contemplated) the Board of Directors of the Employer decides that the Employee should cease involving himself with, and/or divest himself of any interest in,

such other business, then the Employer may direct the Employee to cease such involvement and/or divest himself of such interest, and the Employee shall as expeditiously as possible, cease such involvement and/or divest himself of such interest.

3.6 It is expressly agreed that, subject to Section 3.5 hereof, Employee shall be permitted to own, without limitation, actually or beneficially, capital stock or other equity interests in R.L.R. Concepts, Inc. and Prupis, Beck and Warder, Inc., both of which are Florida corporations, provided such businesses limit their underwriting and sales activities solely to life and health insurance.

4. *Compensation.*

4.1. *As compensation while employed hereunder, Employee shall be paid, in the manner hereinafter set forth by Employer a minimum annual salary of ONE HUNDRED THIRTY-TWO THOUSAND ($132,000) DOLLARS.*

4.2 In addition to the minimum annual salary [set] forth above, Employer's Board of Directors, in conjunction with the Employee, shall conduct an annual performance review of the Employee and the Employee may, but need not necessarily, receive a bonus or an increase in his minimum annual salary or both, in such amount(s) as the Board of Directors in its sole discretion may decide is appropriate.

4.3 The Employee's salary shall be paid in twelve (12) monthly installments, from which shall be deducted income

taxes, social security taxes, and such other and similar payroll deductions as laws now or hereafter in force may require.

4.4 In addition to the foregoing annual salary, Employer further agrees, at its option, to either (a) furnish Employee an automobile and all expenses related to its operation and maintenance, or (b) with respect to an automobile furnished by Employee, reimburse Employee for all operating expenses of such automobile plus an allowance for depreciation of FOUR HUNDRED ($400) DOLLARS per month.

4.5 The employee shall be reimbursed by the Employer for reasonable business expenses properly incurred and documented by him in performing his employment duties hereunder.

4.6 The Employee shall use his reasonable best efforts to purchase, at rates substantially comparable to standard rates, one or more policies of disability income insurance for his benefit, which policies will, after a six month waiting period, provide him with benefits, in the aggregate, equal to an amount not in excess of his then current compensation under section 4.1. Upon such purchase, and subject to such reasonable requirements as Employer may request (*e.g.* verification of premium, terms and benefits) and during the term of this Agreement, the Employer shall either reimburse Employee for such premiums or pay such premiums directly to the insurer.

4.7 During the term of this Agreement, the Employee and his immediate family shall be entitled to participate in any "Employee Health Benefit Plan" maintained by Employer for which he and they are eligible and in accordance with the terms of such plan or plans.

For purposes hereof, an "Employee Health Benefit Plan" is a disability, hospitalization, major medical, life insurance or other similar plan.

4.8 During the term of the Employee's employment, the Employer shall reimburse the Employee for the premiums (based upon standard rates only) for one year renewable term life insurance purchased by Employee in an amount not to exceed the difference between $1.5 million and the face amount of life insurance, if any, provided by Employer pursuant to Section 4.7 hereof.

4.9 The liability of Employer pursuant to Sections 4.6 and 4.8 shall be limited solely to the reimbursement of Employee of premiums. The Employer shall have no liability for the failure of the Employee or Employer to obtain any such policies or for any insurer to pay any benefits. The Employer shall have no liability for the cancellation of a policy due to a late payment or non-payment of premiums.

5. *Vacation.* During the term of this Agreement and prior to the Cessation Date, Employee shall be entitled each calendar year to a vacation of four (4) weeks or the equivalent of twenty (20) working days, noncumulative, without loss of pay. For purposes of this Article the term "working days" includes Monday through Friday.

6. *Disability.*

6.1 A "Disability" shall be defined as the inability of Employee, by reason of physical illness or injury, to substantially perform his duties as an employee of Employer. For purposes hereof, Disability shall not

include the inability to perform duties by reason of mental and/or emotional illness or stress. The Board of Directors of the Employer and the Employee shall determine whether the Employee is Disabled, when such Disability commenced, whether it is continuing and when it has ended. In the event of a disagreement, such disagreement shall be resolved by arbitration in Plantation, Florida under the rules and auspices of the American Arbitration Association.

6.2 In the event of a Disability prior to an Event of Termination (hereinafter defined in section 7.1), the following wage continution [sic] plan shall become effective:

(a) During the first six (6) months of such Disability, Employee shall continue to receive one hundred (100%) percent of the annual salary being paid to him pursuant to Article 4 hereof at the time of the commencement of the Disability plus (x) all sums received by him, if any, under any policy or policies of disability income insurance purchased or paid for by Employer pursuant to section 4.6 or Section 4.7, but less (y) the maximum benefits payable under any temporary disability benefits laws of the State of Florida, if adopted.

(b) After the first six (6) months of such Disability and until the latter of five (5) years after such Disability commenced or the balance of the term of this Agreement, including any renewal hereof validly exercised by the Employee pursuant to Article 2 hereof, during which such Disability shall continue, Employee shall receive, notwithstanding the termination of this Agreement, the lesser of:

(i) forty (40%) percent of the annual salary being paid to him pursuant to Section 4.1 hereof at the commencement of the Disability; or

(ii) eighty (80%) percent of the annual salary being paid to him pursuant to Article 4 hereof at the commencement of the Disability less (x) all sums received by him, if any, under any policy or policies of disability income insurance purchased or paid for by Employer pursuant to Section 4.6 or Section 4.7 and also less (y) the maximum benefits payable under any temporary disability benefits laws of the State of Florida, if adopted.

(c) After the termination of the period described in Subsection 6.2(b), the Employee shall not receive any salary, but shall have the right to receive any and all payments made by any insurance company under any policy of disability income insurance on Employee purchased or paid for by Employer, said right to payments to exist notwithstanding the termination of this Agreement.

(d) During the first twelve (12) months of a Disability, but not thereafter, the Employer shall continue to make the payments provided for in section 4.4.

(e) During the period that the Employer is making payments to Employee pursuant to Subsection 6.2(a) or 6.2(b), but not thereafter, the Employer shall continue to make the payments provided for in sections 4.6, 4.7 and 4.8.

6.3 In the event of the return of Employee to his duties as an employee of the Employer on a full-time

basis for a period of five (5) consecutive business days, then for so long as Employee shall continue to work on a full-time basis as aforesaid and until the termination of the Disability, Employee shall receive his full salary computed as of the first day of his return.

6.4 For purposes of determining whether a Disability is a new Disability or a continuation of a previous Disability, a Disability shall not be deemed to have terminated unless Employee shall have returned to his duties as an employee of Employer on a full-time basis for a period of three (3) continuous and consecutive months.

7. *Termination.*

7.1 Upon the occurrence of any of the following events (hereinafter individually referred to as an "Event of Termination") the Employee's employment under this Agreement and his rights hereunder (but not the provisions of Articles 7, 8, 9 and 10 hereof, or, if the Event of Termination is Subsection 7.1(b), the provisions of Section 6.2 hereof, all of which shall survive any termination of the Employee's employment hereunder) shall terminate:

(a) The death of Employee;

(b) The Disability of the Employee for twenty-four (24) continuous and consecutive months;

(c) Employee's inability or substantial failure to perform the material duties of Employee under this Agreement or a violation by Employee of a material term of this Agreement; provided that, in the case of a failure or violation (other than a violation with respect to which Subsection 7.1(d) is applicable) which is susceptible to cure, same has not been cured within sixty (60) days of

notice to the Employee by the Employer of such failure or violation;

(d) Employee's wiifull violation of Subsection 3.3(d) or of Article 8;

(e) Employee's embezzlement of Employer's property;

(f) The conviction of the Employee of a felony; or

(g) The resignation of the Employee, with or without cause.

7.2 In the event the employment of Employee is improperly terminated by the Employer (which shall mean a termination for any reason other than set forth in Subsections 7.1(a) through 7.1(f) inclusive) or the Employee resigns for cause (which shall mean the continued material violation of the terms of this Agreement by the Employer which is not cured within sixty (60) days after written notice thereof by the Employee to the Employer), *then the Employee shall have the right, privilege and option (the "Option") to sell all but not less than all, of his stock in the Employer to the Employer and upon the exercise of the Option* (unless rescinded as hereinafter provided), the Employer shall be required to purchase said stock. Employer, acting by or through its Board of Directors, shall have the right to assign its obligation to purchase said stock to any one or more persons. Said assignment shall not relieve the Employer of its obligations under this Section 7.2.

(a) The Employee shall exercise the Option by notice thereof to the Employer within thirty (30) days after the Cessation Date.

(b) The purchase price of said stock shall be its fair market value as of the Cessation Date as determined (the "Determination") by Smith Barney, Harris Upham & Co., Inc. or such other comparable investment banker as may be selected by the Employer.

(c) Notwithstanding his prior exercise of the Option, if the Employee, upon receipt of the Determination, decides not to sell his stock to the Employer at the purchase price set forth in the Determination, he shall have a period of fifteen (15) days after receipt of the Determination to rescind his exercise of the Option and to retain his stock in the Employer. Such election to rescind the exercise of the Option shall be made by notice thereof to the Employer, given within said fifteen (15) day period. Upon such rescission, the Employee shall have no further right to exercise the Option and his prior exercise thereof shall be null and void.

(d) The closing ("Closing") of the transaction of sale and purchase shall occur on the first business day of the second calendar month succeeding the month in which the Determination is given to Employer and Employee. At the Closing, the Employee shall deliver to the Employer all of his stock in the Employer, duly endorsed for transfer, free and clear of all liens, encumbrances and security interests.

(e) The entire purchase price for the stock of the Employee sold pursuant to Section 7.2 *shall bear interest at the rate of nine (9%) percent per annum on the*

unpaid balance and shall be paid in sixty (60) equal consecutive monthly installments, inclusive of principal and interest at the rate aforesaid, with the first payment due and payable at the Closing and the balance of the payments due on the first day of each month thereafter until the purchase price together with interest has been paid in full. In the event that any installment of the purchase price is not paid on the due date thereof and within thirty (30) days after notice of default given by Employee to Employer, the entire unpaid balance together with accrued interest, at the option of the Employee, shall be due and payable. The Employer shall have the right to prepay all or any portion of the purchase price, together with accrued interest, at any time, without penalty or premium. Any such prepayments shall be credited against installments due in the inverse order of maturity.

(f) If Employee closes the sale of his stock to the Employer pursuant to the Option, the cost of obtaining the Determination shall be borne equally by the Employer and Employee; however, if Employee rescinds his exercise of the Option, the entire cost of the Determination shall be borne by the Employer.

8. *Covenant Not to Compete.*

8.1 *Certain Definitions.* For purposes of this Article 8, the following terms shall be defined by this Section 8.1.

(a) "Engaged in the surety or Fidelity Business" means to sell and/or issue surety and/or fidelity insurance and/or reinsurance, including but not limited

to contract surety bonds, credit enhancement bonds, subdivision bonds, fidelity bonds, license and permit bonds, and judicial bonds.

(b) "Person" shall mean any individual, sole proprietorship, joint venture, partnership, corporation, association, cooperative, trust, estate, or any other entity of any nature whatsoever.

8.2 Except as otherwise provided in Section 8.3 below, during the term of this Agreement and for a period of twenty-four (24) consecutive calendar months following the Cessation Date, the Employee shall not:

(a) Establish, own, manage, or operate, or participate in the establishment, ownership or management of, or be a director, officer, employee, salesman, agent or representative of, or be a consultant to, any Person Engaged in the Surety or Fidelity Business in Florida, New Jersey or in any other state in which the Employer, or any of its subsidiaries, has materially Engaged in the Surety or Fidelity Business at any time during the twelve (12) month period immediately preceding the Cessation Date;

(b) As a manager, director, officer, employee, salesman, agent, representative or consultant, (A) Engage in the Surety or Fidelity Business or in any other business ("Other Business") in which the Employer or any of its subsidiaries has been engaged at any time during the twelve (12) month period immediately preceding the Cessation Date (B) Within the states of Florida, New Jersey and any other state in which the Employer or any of its subsidiaries has materially Engaged in the

Surety or Fidelity Business or materially engaged in such other Business during such twelve (12) month period.

8.3(a) Notwithstanding anything contained in this Agreement to the contrary, the Employee shall not be deemed to have violated this Article 8 if he shall engage in any such activity with the express prior written consent of the Board of Directors of Employer. Any consent granted to the Employee hereunder shall be revocable by vote of the majority of the Board of Directors of Employer at any time, prior or subsequent to the Cessation Date, upon fifteen (15) days prior notice to Employee, and Employee agrees to cease and desist any previously consented to activity immediately upon receipt of such notice if such activity would otherwise be prohibited under the terms of this Agreement.

(b) This entire Article 8 shall not be applicable from and after a termination of this Agreement arising solely pursuant to Subsection 7.1(b) relating to a Disability.

8.4 The Employee acknowledges that he is one of the founders of the Employer, one of its key executive officers and, together with other individuals comparably involved in the affairs of Employer, one of its controlling shareholders. The Employee further acknowledges that upon the formation of Employer, investors, not actively engaged in the business affairs of Employer, invested over THREE MILLION TWO HUNDRED THOUSAND ($3,200,000) DOLLARS in the Employer, that the Employer is in the process of offering approximately THIRTY MILLION($30,000,000) DOLLARS of new securities to investors, most of whom will not be actively

engaged in the affairs of the Employer, and that a material inducement to such investors was and is the continued employment of Employee by Employer and the inability of Employee to compete with Employer following the cessation of his employment by Employer. In consideration thereof, and in consideration of the Employer entering into this Agreement, the Employee declares that the foregoing territorial and time limitations are reasonable and properly required for the adequate protection of the business of the Employer and of the investment in Employer by the Employee's fellow shareholders, and that in the event that any such territorial or time limitation is deemed to be unreasonable by a court of competent jurisdiction, then the Employee agrees to submit to the reduction of either or both of said territorial and time limitations to such an area and/or period as said court shall deem reasonable.

8.5 In the event the Employee should be in violation of the aforementioned restrictive covenants, then: (a) the time limitation thereof shall be extended for a period of time equal to the period of time during which such breach or breaches should occur; and, (b) in the event the Employer should be required to seek relief in any court or other tribunal, then the covenant shall be extended for a period of time equal to the pendency of such proceedings, including appeals; and (c) the Employee shall reimburse the Employer for Employer's legal fees and other costs reasonably incurred by Employer to enforce its rights hereunder.

9. *Disclosure of Information.* The Employee acknowledges that his relationship with the Employer shall be

one of trust and confidence and that there shall be available to him certain confidential information. At all times during and the term of Employee's employment with the Employer and for a period of forty-eight (48) consecutive calendar months thereafter, the Employee shall not, except with the Employer's express prior written consent, or except in the proper course of his employment with the Employer, and except for such knowledge or information as shall otherwise come into the public domain, directly or indirectly, communicate, disclose or divulge to any person, firm, corporation, association or other entity or use to his own benefit or the benefit of any person, firm, corporation, association or other entity, any confidential or proprietary knowledge or information, no matter when or how acquired, concerning the conduct and details of the Employer's business, including without limitation names of customers, marketing methods, trade secrets, policies, prospects and financial condition.

10. *Injunctive Relief.* If there is a breach of any of the provisions of Articles 8 or 9 of this Agreement, the parties acknowledge that monetary damages would be an inadequate remedy and the Employer shall be entitled in addition to any other remedies available to it at law or in equity, to an injunction restraining the Employee from such breach.

11. *Severability.* If any provision of this Agreement shall be declared invalid or illegal for any reason whatsoever, then notwithstanding such invalidity or illegality, the remaining terms and provisions of the within Agreement shall remain in full force and effect in the same manner as if the invalid or illegal provisions had not been contained herein.

12. *Prior Employment Agreements.* The employment agreement dated August 22, 1983 (the "Prior Agreement") between Employer's subsidiary, Southeastern Casualty and Indemnity Insurance Co., Inc., a Florida corporation (the "Subsidiary"), and Employee regarding the employment by the Subsidiary of Employee is hereby rescinded and rendered null and void and of no further force and effect from and after the Effective Date. The Subsidiary is executing this Agreement at the foot hereof for the sole purpose of agreeing to the termination of the Prior Agreement.

13. *Subordination.* From and after the second to occur of the Cessation Date and an Event of Default under any debenture issue by the Employer on or before the Effective Date (all debentures so issued being referred to as the ("Debentures") and as long as such Event of Default is continuing, no sums which may be, or shall become, due and owing to Employee from the Employer arising out of this Agreement, shall be paid to Employee until such Event of Default has been cured or such Debenture paid in full.

14. *Miscellaneous.*

14.1 *Applicable Law.* This Agreement shall be governed by and construed under the laws of the State of Florida. The parties hereto agree that any legal action concerning any claims, disputes or controversies arising out of or relating to this Agreement, shall only be commenced in the State of Florida. The parties hereto further agree and consent to jurisdiction of the courts of said state. The parties hereto further agree to accept service of any pleadings (and such service shall be valid), if made

by certified or registered mail, return receipt requested, to the parties as set forth in Section 14.7 hereof.

14.2 *Assignment.* The rights and obligations of the Employer under this Agreement shall inure to the benefit of and shall be binding upon the successors of the Employer and may be assigned, for all or any part of the term hereof, by the Employer to any affiliated entity; PROVIDED, HOWEVER, that the Employer shall remain liable for the obligations of the Employer hereunder notwithstanding such assignment. In the event of such assignment, any and all references to the "Employer" in other paragraphs of this Agreement shall be deemed to mean and include such assignee. The Employee shall not have the right to assign this Agreement or any portion hereof. This Agreement shall be binding upon the estate, heirs and legal representatives of the Employee.

14.3 *Further Assurances.* The parties agree that they shall execute and deliver any and all additional writings, instruments and other documents contemplated hereby or referred to herein and shall take such further action as shall be reasonably required in order to effectuate the terms of this Agreement.

14.4 *Article Headings.* The article headings contained in this Agreement are for reference purposes only, and shall not affect the meaning or interpretation of this Agreement.

14.5 *Modification.* This Agreement shall not be amended, modified or supplemented at any time unless by a writing executed by the parties hereto. No amendment, supplement or termination of this Agreement shall

affect or impair any rights or obligations which have heretofore matured hereunder.

14.6 *Cumulative Rights; Waiver.* Each and every right granted to a party hereunder, or in any other document contemplated hereby, or delivered hereunder or executed concurrently herewith, or by law or equity, shall be cumulative and may be exercised at any time, or from time to time. No failure on the part of any party to exercise, and no delay in exercising, any right shall operate as a waiver thereof, nor shall any single or partial exercise by any party of any right preclude any other or future exercise thereof or the exercise of any right. The failure of any party at any time, or from time to time, to require performance by any other party of any term, condition or provision of this Agreement shall in no way alter or otherwise affect the right of such party at a later time to enforce the same. No waiver by any party or any condition or the breach of any condition or the breach of or any term, covenant or provision contained in this Agreement, whether by conduct or otherwise, at any time or from time to time, shall be deemed to be or be construed as a further or continuing waiver of any such condition or a breach or as a waiver of any other condition or of any other or subsequent breach of the same or any other term, covenant or provision.

14.7 *Notice.* All notices or other communications required or permitted hereunder shall be in writing and shall be considered given or made if mailed in the United States, by registered or certified mail, postage prepaid, return receipt requested or if sent by prepaid telegram and addressed:

(a) If to the Employer:

Southeastern Insurance Group,
Incorporated
1620 West Oakland Park Boulevard
Suite 200
Fort Lauderdale, Florida

with copy to:

Paul M. Petigrow, Esq.
Lampf, Lipkind, Prupis
& Petigrow
80 Main Street
West Orange, New Jersey 07052

(b) If to Beck:

Robert A. Beck, II
18201 Daybreak Drive
Boca Raton, Florida 33434

with a copy to:

Jerald A. Freshman, Esq.
Freshman, Freshman
& Michelson, P.A.
5975 Sunset Drive
Miami, Florida

Any change in address shall only be binding after written notice to the other party hereto.

15. *Defined Terms.* All defined terms used in this Agreement and not specifically defined in context are defined in this Article 15.

15.1 "Cessation Date" shall mean the date the Employee shall first cease to be employed by the Employer.

15.2 "Effective Date" shall mean the closing of that certain private placement of securities aggregating approximately THIRTY MILLION ($30,000,000) DOLLARS which is presently contemplated by Employer. If such closing shall not occur prior to December 31, 1986, then this Agreement shall be null and void and the Prior Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, the Employee hereto has hereunto set his hand and seal and the Employer has duly authorized and caused these presents to be signed by its President and attested to by its Secretary as of the date first above written.

IN THE PRESENCE OF OR ATTESTED BY:

/s/ Illegible

/s/ Robert A. Beck II (L.S.)
ROBERT A. BECK, II

SOUTHEASTERN
INSURANCE GROUP,
INCORPORATED

/s/ Carl B. Shible
CARL B. SHIBLE,
Secretary

By: /s/ Ronald M. Prupis
RONALD M. PRUPIS,
Executive
Vice President

The Subsidiary is executing this Agreement for the sole purpose of agreeing to the termination of the employment agreement between the Subsidiary and Employee pursuant to Section 12 hereof.

SOUTHEASTERN CASUALTY
AND INDEMNITY
INSURANCE CO., INC.

/s/ Illegible

By: /s/ Ronald M. Prupis
Ronald M. Prupis,
Executive
Vice President

EXHIBIT B

I Engagement

Firemark was hired by the SIG board to conduct a review of the company's operations, procedures, staff and management, as part of the company's preparation for its initial public offering. This was completed by Firemark's two principals, a surety claims specialist, a financial analyst and an administrative/personnel specialist, on premises in the Florida office from May 9 – May 27, 1988.

II Interview Summary

In order to ascertain employee attitudes, recurring themes of problems, if any, and strengths and weaknesses of the staff and senior management, 3 people conducted one-on-one interviews with 72 employees, randomly selected from the computerized employee list. Interviewees included personnel from every department, as well as samplings from all levels and job functions. This summary is based on *actual comments* from SIG employees, most of which have been verified, some of which are still under investigation. Many of the problems are not uncommon for a relatively new, growing company, but the magnitude and pervasiveness of SIG's problems are unique. For many of these issues to be brought up at all is indicative of serious trouble. In general, we found the following lacking:

A. Respect for Senior Management

Claims were made regarding sexual harassment, use of drugs, nepotism, favoritism, role model deficiencies, expense account abuse, family

travel expensed to SIG, transfer of SIG funds into personal accounts, embezzlement of funds, lack of general management ability or knowledge of insurance or surety, immaturity, emotionalism, elitism, numerous discriminatory practices, a "party-hearty" mentality and a lack of respect for the company or for SIG employees, in general. There is no code of ethics for officers.

B. Controls

There is no budget process at any levels, therefore there is no budget review, accountability or concern for spending the company's money. SIG has no internal audit process, no underwriting or claims self-audit, no agency reviews, no underwriter reviews, confusing or inappropriate underwriting authority authorizations, fluctuating underwriting criteria, and a detrimental cash-flow underwriting mentality. Additionally, senior members of management have relatives reporting directly to them, and have the ability to control salary increases, bonuses, privileges and perquisites [sic], in addition to giving rise to probable, detrimental conflicts of interest. There are no checks and balances. There are no specific corporate goals or deviation analyses based on on-going reviews, no time lines for projects, ventures and no planning process at all. There is no management information system (mis) or reports to review results or trends. There is no quality control system.

C. Objectives and Strategic Planning

There are not written objectives either for individuals or the corporation. The few written

goals that some employees have do not include a game plan, time frames or alternative actions. There is *no* MBO at any level. There are no specific objectives, and therefore no way to analyze derivations or deviations. SIG has no formal business plan nor does it have a formal budgeting process. There are no formal departmental strategic plans.

D. Written Policies & Procedures

There are no productivity or quality standards. There are little, if any, written policies or procedures within each department. Those that exist are often changed and consistently confusing.

E. Communication

There is a non-existance [sic] of management or employee information reports. Goals and objectives, if any, are nebulous and only known to a few people. There is minimal availability of policies and procedures. There is no employee newsletter or employee activities group. Performance measures and results by either individuals or departments or even the company are not communicated. Communication to the board is often misleading and frequently whitewashed.

F. Personnel & Training Issues

Fair and equitable treatment of all personnel is inconsistent. Job titles, job levels, organization design, and job descriptions are arbitrary and

need revamping. There is no formal salary survey data or equitable salary administration system. There is no educational reimbursement policy for some employees, while it is available for others. Benefits are not competitive. There is no EEO or Sexual Harrassment [sic] policy/ statement. Many appraisals are not discussed with employees. There is a lack of professional hiring practice. There is no formal supervisory/ management training, nor is there formal job training. There is no development planning process or succession planning process. There is an overall inexperience of the majority of staff and most of senior and middle management. The company is overstaffed by as much as 30-50%. There is no formal, profit-oriented criterion for compensation of professionals and management. There are cliques, in-circles, camps and favoritism. Morale has been purchased by elaborate and costly parties, perks, and amenities. Good moral ebbs and flows, based on the moods of senior managers. There is frequently tension and many employees are scared.

These interviews, done on a card-sort basis, led us to recognize the need for a further, more detailed review of certain topics to include personnel administration, claims, underwriting, CPC, legal, financial controls and accounting and the senior management team.

III Review of Policies and Procedures

There are virtually no formal, written policies and procedures in the company. A few departments have made the effort, such as personnel and follow-up, but the department managers are inexperienced and have NO

ONE to go to for advice, and therefore have inadequately completed the P&P. In those few areas where we see some written guidance, there are no formal procedures for implementation, and the product is lacking in depth and understanding of the subject.

IV Departmental Reviews

Audits were completed on Personnel, Underwriting and Claims. Substantial problems were uncovered in each area.

A. Underwriting

A cash-flow mentality, coupled with pressure to produce premium dollars, and "commissions" to certain underwriters from CPC, and even the agency force, make this one of the least professional operations we've ever seen. There is little or no communication between underwriting and the various support departments, past due agents, or within the department itself due to 3 warring factions. Standard underwriting guidelines are routinely ignored. Policies and Procedures are constantly set and changed and are therefore ignored. Favoritism is rampant, and management is unprofessional. The Underwriting Appeal Process which allows a junior person to ignore the chain of command and get a bad risk written is dangerous. Aetna forms are being used, which send the wrong signals to agents and insureds. Agents are being paid commissions, although they are not licensed. SIG is doing business in states in which it is not licensed. Risks are being "stacked". Underwriting must be controlled. Although there is a core

of professionals, a staffing review must be conducted. Standards and levels of authorization must be instituted.

B. Personnel

The entire department needs changing. There is no privacy. There is nowhere for employees with concerns to go. There is no understanding of parity, EEOC, hiring and termination practices, salary administration, required governmental reports are not completed and required posters on EEOC, Workers' Compensation, disability, and unemployment are not in evidence. There is no counseling or proper performance appraisal process. The staff, including the manager, has no prior personnel training or background.

C. Claims

Files are maintained incorrectly. Reserve authority should be established for each adjuster. Settlement authority must be established. Documentation is atrocious. There is no effective diary system. The staff is inexperienced and incompetent. *Everything* is sent to litigation. Salvage recovery is even in the control of the attorney. Training is non-existent. The entire department must be reconstructed.

V Phase I Initial Recommendations

On May 13, 1988, Firemark recommended the following to the board:

A. Augmentation of the board by an insurance expert.

B. DHS should be requested to expand the scope of their audit.

C. The company should focus on its core business.

D. D&O insurance should be sought.

E. The following management changes:

1. Termination of Ron Prupis.
2. Termination of Bob Beck.
3. Termination of Linda Burton.
4. Demotion of Carl Shible.
5. Len Bellezza named temporary CEO.
6. Immediate search for new CEO and CFO.

F. Procedures and Controls implemented ASAP.

1. MIS.
2. Operating Checks and Balances.
3. Financial controls.

VI Phase I Additional Recommendations

Firemark has additionally recommended:

A. New claims VP be hired.

B. New infra-structure and organizational reporting (see attached proposed organization chart).

C. Bob Pershes be eliminated from any management role and his billing of SIG be investigated.

D. Rich Pettigrow be reassigned to a less taxing position.

E. Judy Weaver be reassigned to handle operational areas only. DP and communications should not report to her because of a conflict of interest.

F. Claims must entirely be revamped.

G. A complete rehaul of Personnel to include salary administration, pb descriptions, and performance appraisals.

H. The formation of a training department.

I. Policy and Procedure writing and implementation across the board.

J. More active involvement by the board of directors.

K. Better cooperation with auditors, regulators and Treasury.

L. Outside investment manager be hired.

M. Review of company benefits.

N. Review of perquisites.

O. Internal Audit department be set up reporting directly to the board of director's audit committee.

P. Staff analysis and appropriate reductions.

Q. Review of DP, communications and mail and file.

R. Formation of company newsletter and activities group.

S. Deletion of numerous parties and perks.

VII Phase II

Phase II, which has already begun, must be continued. Additional investigation must be completed and recommendations made.

VIII Summary

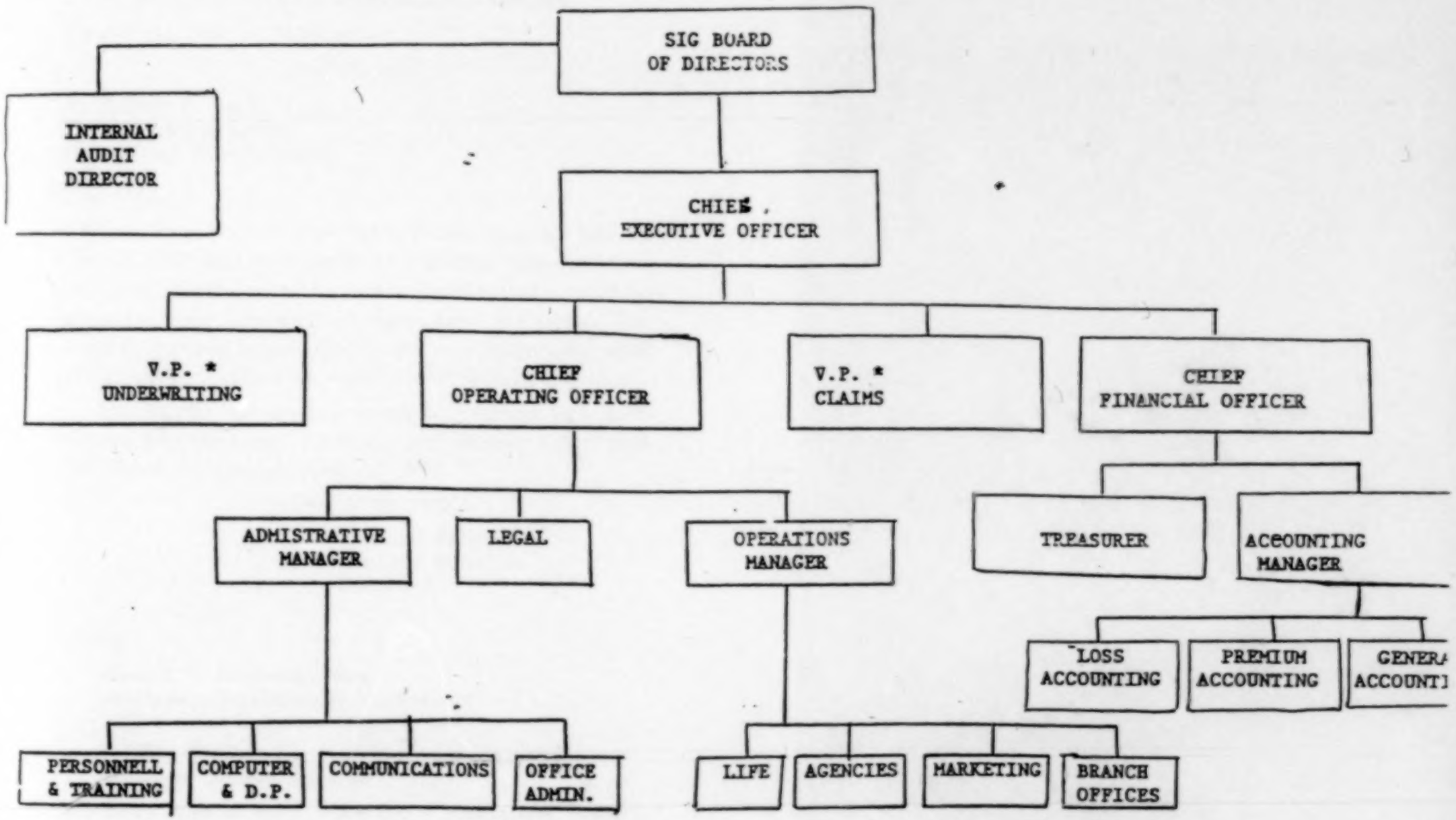
While we strive to be "upbeat" as we operate within Southeastern's office, and indeed are optimistic about the potential of the company, this review for the Board must be candid and realistic.

Although board members resist the use of the term, SIG must frankly be considered a turnaround company. To refuse to acknowledge the number and gravity of problems, or to fail to understand the complexity and difficulty of establishing a profitable operation is shortsighted and dangerous. We are not faced with the task of restoring highly profitable results to an established company that has stumbled. Southeastern has yet to build an infrastructure, and in general has not established a solidly profitable business. Any profits reported in the past are

highly suspect, considering previous management's clearly demonstrated propensity to delude itself and the Board. Firemark's initial recommendations have been considered, and for the most part the Board has begun the implementation. Ron Prupis, Bob Beck and Linda Burton have been removed, and Carl Shible has been demoted. Vigorous audit work has begun, and Board/management interface has been established. A focus on the core surety activities of SIG has been undertaken, and procedures and controls are being implemented. A search for a permanent CEO and FO has begun, and a few candidates have already emerged.

Southeastern is moving in the right direction once again. Challenges and problems still abound, however, and very few recoveries ever occur without relapses and the emergence of still unrecognized obstacles. It is essential that the Board recognize that SIG is not back to normal at this time, that there is still considerable operating work to be done.

Suggested SIG Organization Chart



* After the CEO and CFO have had 6+ months or so to acclimate, the VPs of Claims and Underwriting ould report to the COO.

BEST AVAILABLE COPY

EXHIBIT C

SOUTHEASTERN INSURANCE GROUP

[Names Omitted In Printing]

May 17, 1988

Mr. Robert A. Beck, II
18201 Daybreak Drive
Boca Raton, Florida 33434

Dear Bob:

This letter will confirm the oral advice given you on May 13, 1988 and shall serve as a formal notice that on said date, the Board of Directors unanimously voted to terminate your Employment Agreement for cause. The decision was not made lightly and was taken only after the Board considered an extensive report by Firemark.

The Board has further voted to provide you with severance in the form of continuation of your salary and other benefits through June 30, 1988.

Very truly yours,

/s/ Leonard Bellezza
Leonard Bellezza
President

LB:mcw

cc: Gerald A. Freshman, Esq.
Freshman, Freshman & Michaelson
5975 Sunset Drive
Miami, Florida

Cert:RRR #P 657 300 939

499 N.W. 70th Avenue, Suite 200 • Plantation, Florida
33317 • (305) 581-8100
Toll Free 1 (800) 621-3397 • In Florida
1 (800) 331-4508 • Telecopier (305) 583-6336

EXHIBIT D

GUARANTY

FIRST FIDELITY BANK, NATIONAL ASSOCIATION, NEW JERSEY
(hereinafter called "Bank")
550 Broad Street
Newark, New Jersey 07102

To induce Bank to make loans to SOUTHEASTERN INSURANCE GROUP, INCORPORATED (herein called "Borrower") under the Note and Loan Agreement as referred to below, now or in the future, and with full knowledge that said loans would not be made without this Guaranty, the undersigned Guarantors agree as follows:

The undersigned, each for himself or itself, jointly and severally, hereby guarantee full, prompt and unconditional payment when due of the Liability of the Borrower, (as defined below), to Bank, now existing or hereafter incurred, and the full, prompt, and unconditional performance of every term and condition of any transaction to be kept and performed by the Borrower under the Liability of the Borrower. This Guaranty is a primary obligation of the undersigned and shall be a continuing inexhaustible Guaranty without limitation as to duration and may not be revoked prior to satisfaction in full of the Liability of the Borrower.

The term "Liability of the Borrower" shall include all liabilities of Borrower, now or hereafter existing, due or to become due, to the Bank under that certain Promissory Note to Bank, dated December 30, 1987, in the principal sum of $7,500,000.00, and under a Loan and Security

Agreement (the "Loan Agreement") dated December 30, 1987 from Borrower to Bank and all amendments, modifications, extensions and renewals thereof and substitutions therefor.

Without incurring responsibility to the undersigned and without impairing or releasing the obligations of the undersigned hereunder, Bank may at any time and from time to time (whether or not after revocation or termination of this Guaranty) without prior notice to or the consent of, the undersigned, upon any terms or conditions and it whole or in part:

(1) change the manner, place or terms of payment, and/or change or extend the time for payment or renew or alter, any Liability of the Borrower or any security therefor, and the Guaranty herein made shall apply to the Liability of the borrower as so changed, extended, renewed or altered;

(2) sell, exchange, release, surrender, realize upon or otherwise deal with in any manner and in any order any property by whomsoever at any time pledged, mortgaged or in which a security interest is given to secure, or howsoever securing, the Liability of the Borrower;

(3) exercise or refrain from exercising any rights against the Borrower or others (including the undersigned) or against the security, or otherwise act or refrain from acting;

(4) settle or compromise any Liability of the Borrower, dispose of any security therefor, with or without consideration, or any liability incurred directly or indirectly in respect thereof or hereof, and may subordinate

the payment of all or any part thereof to the payment of any Liability (whether due or not) of the Borrower to creditors of the Borrower other than Bank and the undersigned; and

(5) apply any sums by whomsoever paid or howsoever realized to any Liability of the Borrower.

No invalidity, irregularity or unenforceability of all or any part of the Liability of the Borrower or the impairment or loss of any security therefor, whether caused by any actions or inactions of Bank, or otherwise, shall affect, impair or be a defense to this Guaranty.

The undersigned hereby waives any right of subrogation to any security.

Upon the happening of any of the following events: Event of Default exists under the Loan Agreement; the insolvency of the borrower or any person (including the undersigned) who is liable directly or indirectly in respect of any of the Liability of the Borrower; or a material adverse change in the financial condition of the Borrower or any aforesaid person; or suspension of business of the Borrower or any aforesaid person; or the issuance of any warrant, process or order of attachment, garnishment or other lien and/or the filling of a lien as a result thereof against any of the property of the Borrower or any aforesaid person; or the making by the borrower or any aforesaid person of an assignment for the benefit of creditors, or a custodian being appointed for the Borrower or any aforesaid person or for any property of any of them; or any proceeding being commenced by or against the Borrower or any aforesaid person under any

bankruptcy, reorganization, arrangement of debt, insolvency, readjustment of debt, receivership, liquidation or dissolution law or statute and if such proceedings are against the Borrower or any aforesaid person the same are not dismissed within forty-five (45) days; or if an order for relief as to the Borrower or any aforesaid person is entered under the Bankruptcy Code; or if the Borrower or any aforesaid person is generally not paying their debts as they become due; or any representation in any financial or other statement of the Borrower or any aforesaid person, delivered to Bank by or on behalf of the Borrower or such person, is untrue or incomplete in any material respect then, and in such event, and at any time thereafter, Bank may, without notice to the Borrower or any aforesaid person, make the Liability of the Borrower immediately due and payable hereunder as to the undersigned, and Bank shall be entitled to enforce the obligations of the undersigned hereunder.

In any proceedings to collect any liabilities of the undersigned to bank, the undersigned shall pay all costs and expenses of every kind for collection, including reasonable attorneys' fees.

If claim is ever made upon Bank for repayment or recovery of any amount or amounts received by Bank in payment or on account of any of the Liability of the Borrower and Bank repays all or part of said amount by reason of (a) any judgment, decree or order of any court or administrative body having jurisdiction over Bank or any of its property, or (b) any settlement or compromise of any such claim effected by Bank with any such claimant (including the Borrower), then, and in such event, the undersigned agree that any such judgment, decree, order,

settlement or compromise shall be binding upon the undersigned, notwithstanding any revocation hereof or the cancellation of any note or other instrument evidencing any Liability of the borrower, and the undersigned shall be and remain liable to Bank hereunder for the amount so repaid or recovered to the same extent as if such amount had never originally been received by Bank.

Settlement of any claim by Bank against the borrower or any Guarantor, whether in any proceedings or not, and whether voluntary or involuntary, shall not reduce the amount due under the terms of this Guaranty.

All rights, powers and remedies of Bank hereunder and under any agreement between the Borrower or any Guarantor and Bank, now, or at any time hereafter in force, shall be cumulative and not alternative, and shall be in addition to all rights, powers and remedies given to Bank by law. This Guaranty shall be construed in accordance with the laws of the State of New Jersey.

No delay on the part of Bank in exercising any of its options, powers or rights or partial or single exercise thereof, shall constitute a waiver thereof. No waiver of any of its rights hereunder, and no modification or amendment of this Guaranty, shall be deemed to be made by Bank unless the same shall be in writing, duly signed on behalf of Bank, by a duly authorized officer, and each such waiver, if any, shall apply only with respect to the specific instance involved, and shall in no way impair the rights of Bank or the obligations of the undersigned to Bank in any other respect at any other time.

The undersigned waive notice of acceptance of this Guaranty and notice of any Liability of Borrower to

which it may apply and waive notice of default, non-payment, partial payment, presentment, demand, protest, notice of protest or dishonor and all other notices to which guarantors might otherwise be entitled, or which might be required by law and required to be given by the Bank.

This Guaranty shall be binding upon each of the undersigned Guarantors, their respective successors and assigns, and shall enure [sic] to the benefit of Bank, its successors and assigns.

The undersigned hereby authorizes Bank, in its sole discretion, to disclose any financial or other information it may have about the undersigned to any present or future participant or prospective participant, any regulatory body or agency having jurisdiction over Bank, or to any person which succeeds to all or any part of bank's interest herein.

This guaranty may be executed to the parties hereto individually or in combination, in one or more counterparts; each of which shall be an original, all of which shall together shall contribute one and the same document. The undersigned hereby authorized Bank to complete the date of this guaranty and the date of the Note and Loan Agreement with the date on which the closing of the transactions completed hereby actually occurs.

December 30, 1987

LEONARD BELLEZZA

/s/ Robert A. Beck, II
ROBERT A. BECK, II

/s/ Robert Pershes
ROBERT PERSHES

/s/ Carl B. Shible
CARL B. SHIBLE

WILLIAM D. LIPKIND

ERNEST J. SABATO

/s/ Harry Olstein
HARRY OLSTEIN

WILLIAM PAULUS, JR.

/s/ Neil Prupis
NEIL PRUPIS

/s/ Ronald Prupis
RONALD PRUPIS

STATE OF FLORIDA :
COUNTY OF BROWARD : SS.

BE IT REMEMBERED, that on this 29th day of December in the year Nineteen Hundred Eighty Seven, before me the subscriber, THERESA M. WALDRON personally appeared ROBERT A. BECK, II, ROBERT PERSHES, CARL B. SHIBLE, HARRY OLSTEIN, NEIL PRUPIS and RONALD M. PRUPIS who I am satisfied are the persons mentioned in the within instrument, and I having made known to them the contents thereof, they acknowledged that they signed, sealed and delivered the within Guaranty as their voluntary act and deed for the

uses and purposes therein expressed and that they acknowledged receipt of a true copy of the within instrument.

/s/ Theresa M. Waldron
Notary Public

(SEAL)

Illegible

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 91-8121-CIV-ROETTGER

ROBERT A. BECK, II,

Plaintiff,

VS.

RONALD M. PRUPIS, et al.,

Defendants.

_____/

PLAINTIFF'S RESPONSE TO RICO CASE STANDING ORDER

Plaintiff, Robert A. Beck, II ("Beck"), files the following response to the Court's RICO Case Standing Order:

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962(a), (b), (c) and/or (d):

The alleged unlawful conduct is in violation of 18 U.S.C. §1962(a), (b), (c) and (d).

2. List each defendant and state the alleged misconduct and basis of liability of each defendant:

Beginning in or around the fall of 1985, the defendants devised an artifice to defraud and to obtain money and property from Beck and others by means of false pretenses, representations and promises and to obstruct, delay and affect commerce by means of extortion. This illegal pattern of wrongdoing was done within the auspices of Southeastern Insurance Group, Inc., a holding

company that operated several insurance company subsidiaries ("SIG"). The following is the specific misconduct alleged on behalf of each of the defendants:

a. Ronald Prupis ("R. Prupis"):

i. *Fraudulent Financial Information.* Beginning in or around August of 1987, this defendant (and others) conspired to and did falsify financial information (especially relating to claims) relating to SIG for the purpose of issuing fraudulent statements to Beck, to the regulators, to the federal government, to First Fidelity Bank, and to the shareholders and creditors of SIG. *See* Complaint at ¶19 (copy attached as Exhibit "A"). In addition, this defendant (and others) materially understated the loss reserve liabilities of SIG.

ii. *Extortion of Contractors:* In early 1987, this defendant (and others) conspired to and did create a separate corporation, Contractors Performance Corp. ("CPC"), in order to cover up an illegal manner of operating SIG. CPC was set up for the purpose of extorting contractors applying for surety bonds from the SIG insurance subsidiaries. This was done by forcing the contractors to pay illegal fees to CPC to qualify for surety bonds, in addition to the surety bond premium payable to the SIG insurance subsidiaries. Over 100 contractors applying for SIG surety bonds were forced to pay fees to CPC. Specific examples, including victims, are set forth in ¶¶23-28 of the Complaint.

In addition, as more fully set forth in ¶¶29-30 of the Complaint, this defendant (and others) conspired to and

did fraudulently hide the illegal nature of CPC's operations from Beck, other officers of SIG and the regulatory authorities.

iii. *Looting:* As more fully detailed in ¶¶20-21, 33-34 and 37-41, this defendant (and others) conspired to and did loot SIG for his personal benefit.

iv. *Attempted Options Fraud:* This defendant (and others) fraudulently attempted to provide options to purchase SIG stock to certain individuals. This attempted fraud would have resulted in a massive shift of shareholder's equity from all of the shareholders to only a few, who also were senior officers and directors of SIG. *See* Complaint at ¶36.

v. *Fraudulent Termination of Beck for Cause:* This defendant (and others) conspired to and did engage in systematic efforts to fraudulently create causes for Beck's termination, by portraying Beck as an ineffective officer, by holding him responsible for actions of irresponsible management over which Beck had no authority or control, and by holding Beck accountable for failures of senior management, despite the fact that they were outside his area of responsibility. This fraud was committed in order to improperly substantiate a termination for cause and to shift the blame for the defendants' (all of whom were the senior officers and directors of SIG) illegal conduct. Beck would no longer be able to report improper activities, and, moreover, could be used as a scapegoat for whatever illegal activities came to light. *See* Complaint at ¶¶43-60.

vi. *Fraudulent Inducement To Execute Personal Guaranty:* In or around November and December of 1987, this defendant (and others) conspired to and did fraudulently induce Beck to personally guaranty a $7.5 million loan from First Fidelity Bank to SIG. The loan was needed by the defendants to continue their racketeering conduct. In their application for this loan, the defendants utilized the fraudulently created financial statements and fraudulently created financial estimates, all of which greatly overstated the financial condition of SIG.

To further fraudulently induce Beck to enter into this personal guarantee, this defendant (and others) conspired to and did employ false and misleading statements and omissions to cause Beck to believe that his employment contract would continue to be honored. However, the defendants had no intention of honoring Beck's contract, as they had already embarked on their criminal conduct and their associated scheme of creating fraudulent causes for Beck's termination and creating a scapegoat for their illegal conduct.

To further fraudulently induce Beck to enter into this personal guaranty, this defendant (and others) conspired to and did utilize fraudulent financial information to cause Beck to believe that SIG was in a much better financial position than it actually was. Had Beck known: (1) the true financial condition of SIG, (2) the illegal activities committed by the defendants, or (3) the plans to terminate him and use him as a scapegoat, he would not have executed the personal guaranty.

As a result of the looting of SIG and its subsidiaries by the defendants, SIG was unable to repay the loan and

Beck's personal guaranty was triggered. *See* Complaint at ¶¶ 61-73.

vii. *Fraudulent Inducement to Extend Unsecured Loan to SIG:* On or about August 11, 1986, this defendant (and others) fraudulently induced Beck to extend a $150,000 loan to SIG. The fraudulent statements related to: (1) the true financial condition of SIG, (2) the illegal activities committed by the defendants, and (3) the plans to terminate Beck and use him as a scapegoat.

b. Leonard Bellezza:

i. *Fraudulent Financial Information: See,* Section 2(a)(i), *supra*. Further, in order to cover-up the defendants' looting of SIG, this defendant (and others) conspired to and did falsify financial reports of SIG's insurance subsidiaries by creating sham receivables.

ii. *Extortion of Contractors: See* Section 2(a)(ii), *supra*.

iii. *Looting: See* Section 2(a)(iii), *supra*.

iv. *Attempted Options Fraud: See* Section 2(a)(iv), *supra*.

v. *Set Aside Fraud:* This defendant held a financial interest, contrary to federal law, in Aldrich Construction, Inc., a minority company entitled to the set aside of various government funds. To further this financial interest, this defendant used his position at SIG to cause bonds to be issued to this minority company for which the company did not financially qualify.

vi. *Fraudulent Promises to Indemnify:* To secure the release of bonds for several contractors, this defendant fraudulently promised to sign indemnity agreements to indemnify SIG for claims and losses on the bonds. These agreements were never signed. Specific examples of this fraudulent practice are set forth in ¶32 of the Complaint.

vii. *Fraudulent Termination of Beck for Cause: See* Section 2(a)(v), *supra*.

viii. *Fraudulent Inducement To Execute Personal Guaranty: See* Section 2(a)(vi), *supra*.

ix. *Fraudulent Inducement to Extend Unsecured Loan to SIG: See* Section 2(a)(vii), *supra*.

c. Byron L. Sparber ("Sparber"):

i. *Fraudulent Financial Information: See* Section 2(b)(i), *supra*, as to the cover-up of looting only.

ii. *Extortion of Contractors: See* Section 2(a)(ii), *supra*, as to facilitating and conspiring to extort only.

iii. *Looting: See* Section 2(a)(iii), *supra*.

iv. *Attempted Options Fraud: See* Section 2(a)(iv), *supra*.

v. *Fraudulent Termination of Beck for Cause: See* Section 2(a)(v), *supra*.

vi. *Fraudulent Inducement To Execute Personal Guaranty: See* Section 2(a)(vi), *supra*.

vii. *Fraudulent Inducement to Extend Unsecured Loan to SIG: See* Section 2(a)(vii), *supra*.

d. William D. Lipkind ("Lipkind"):

i. *Fraudulent Financial Information: See* Section 2(b)(i), *supra.*

ii. *Extortion of Contractors: See* Section 2(a)(ii), *supra.*

iii. *Looting: See* Section 2(a)(iii), *supra.*

iv. *Attempted Options Fraud: See* Section 2(a)(iv), *supra.*

v. *Fraudulent Termination of Beck for Cause: See* Section 2(a)(v), *supra.*

vi. *Fraudulent Inducement To Execute Personal Guaranty: See* Section 2(a)(vi), *supra.*

vii. *Fraudulent Inducement to Extend Unsecured Loan to SIG: See* Section 2(a)(vii), *supra.*

e. Neil Prupis ("N. Prupis"):

i. *Fraudulent Financial Information: See* Section 2(b)(i), *supra.*

ii. *Extortion of Contractors: See* Section 2(a)(ii), *supra.*

iii. *Looting: See* Section 2(a)(iii), *supra.*

iv. *Attempted Options Fraud: See* Section 2(a)(iv), *supra.*

v. *Fraudulent Termination of Beck for Cause: See* Section 2(a)(v), *supra.*

vi. *Fraudulent Inducement To Execute Personal Guaranty: See* Section 2(a)(vi), *supra.*

vii. *Fraudulent Inducement to Extend Unsecured Loan to SIG: See* Section 2(a)(vii), *supra.*

f. Ernest J. Sabato ("Sabato"):

i. *Fraudulent Financial Information: See* Section 2(b)(i), *supra,* as to the cover-up of looting only.

ii. *Looting: See* Section 2(a)(iii), *supra.*

iii. *Attempted Options Fraud: See* Section 2(a)(iv), *supra.*

iv. *Fraudulent Termination of Beck for Cause: See* Section 2(a)(v), *supra.*

v. *Fraudulent Inducement To Execute Personal Guaranty: See* Section 2(a)(vi), *supra.*

vi. *Fraudulent Inducement to Extend Unsecured Loan to SIG: See* Section 2(a)(vii), *supra.*

g. William Paulus, Jr. ("Paulus"):

i. *Fraudulent Financial Information: See* Section 2(b)(i), *supra.*

ii. *Extortion of Contractors: See* Section 2(a)(ii), *supra.*

iii. *Looting: See* Section 2(a)(iii), *supra.*

iv. *Attempted Options Fraud: See* Section 2(a)(iv), *supra.*

v. *Fraudulent Termination of Beck for Cause: See* Section 2(a)(v), *supra.*

vi. *Fraudulent Inducement To Execute Personal Guaranty: See* Section 2(a)(vi), *supra.*

vii. *Fraudulent Inducement to Extend Unsecured Loan to SIG: See* Section 2(a)(vii), *supra.*

h. **Harry Olstein ("Olstein"):**

i. *Fraudulent Financial Information: See* Section 2(b)(i), *supra,* as to the cover-up of looting only.

ii. *Looting: See* Section 2(a)(iii), *supra.*

iii. *Attempted Options Fraud: See* Section 2(a)(iv), *supra.*

iv. *Fraudulent Termination of Beck for Cause: See* Section 2(a)(v), *supra.*

v. *Fraudulent Inducement To Execute Personal Guaranty: See* Section 2(a)(vi), *supra.*

vi. *Fraudulent Inducement to Extend Unsecured Loan to SIG: See* Section 2(a)(vii), *supra.*

i. **Frederick C. Mezey ("Mezey"):**

i. *Fraudulent Financial Information: See* Section 2(b)(i), *supra,* as to the cover-up of looting only.

ii. *Looting: See* Section 2(a)(iii), *supra.*

iii. *Attempted Options Fraud: See* Section 2(a)(iv), *supra.*

iv. *Fraudulent Termination of Beck for Cause: See* Section 2(a)(v), *supra.*

v. *Fraudulent Inducement To Execute Personal Guaranty: See* Section 2(a)(vi), *supra.*

vi. *Fraudulent Inducement to Extend Unsecured Loan to SIG: See* Section 2(a)(vii), *supra.*

j. **Joseph S. Littenberg ("Littenberg"):**

i. *Fraudulent Financial Information: See* Section 2(b)(i), *supra,* as to the cover-up of looting only.

ii. *Looting: See* Section 2(a)(iii), *supra.*

iii. *Attempted Options Fraud: See* Section 2(a)(iv), *supra.*

iv. *Fraudulent Termination of Beck for Cause: See* Section 2(a)(v), *supra.*

v. *Fraudulent Inducement To Execute Personal Guaranty:* See Section 2(a)(vi), *supra.*

vi. *Fraudulent Inducement to Extend Unsecured Loan to SIG: See* Section 2(a)(vii), *supra.*

3. List the alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer:

a. Lampf, Lipkind, Prupis & Petigrow, P.C. ("Lampf Lipkind"): Conspired and assisted the defendants in much of the above-described conduct. In addition, provided unnecessary legal services, charged excessive rates,

and operated under a conflict-of-interest, assisting in the looting of SIG.

b. Firemark Consultants, Inc., its employees, agents and representatives, including Michael J. Morrissey and Joanne S. Morrissey: Conspired to fabricate causes for Beck's termination.

c. Stuart Glasser: Recipient of $500,000.00 payment, the funds for which had been improperly diverted from SIG's subsidiaries by the defendants.

4. List the alleged victims and state how each victim was allegedly injured:

a. Robert A. Beck, II:

i. The defendants fraudulently created causes and fraudulently caused SIG to terminate Beck "for cause" so that they could continue and preserve their racketeering activity, prevent Beck from effectively "blowing the whistle," and, at the same time, avoid their enterprise being liable to Beck for damages for breach of contract. The defendants also damaged Beck's reputation so that his claims of their improper acts would not be believed and also so that he could be a scapegoat they could blame for their improper activities.

ii. The defendants fraudulently induced Beck to personally guaranty [sic] a $7.5 million loan. The guaranty was triggered as a result of the defendants' looting and other illegal conduct.

iii. Beck was fraudulently induced to loan $150,000 to SIG.

iv. Beck was induced to be a shareholder in SIG. By looting SIG and the engaging in their illegal conduct, the Defendants caused the value of Beck's stock to greatly depreciate.

b. SIG's Shareholders and Creditors: By looting SIG and its subsidiaries, and engaging in illegal conduct, the defendants caused SIG to become insolvent. This greatly damaged SIG's shareholders and creditors, most of which were fraudulently induced by the defendants to invest in and/or loan to SIG in the first place.

c. Construction Design Real Estate, Inc., JJW Construction, Inc., Chief Structures, Inc., McKamish Chesapeake, Inc., ID&T Drywall, Inc., All Bright Electric, Inc., Shoemaker Plumbing Co., SCR Drywall, Inc., C.I.P.I. Corp., Agmilu & Co., Ahmad Construction Co., AAV Construction Co., and Dale Construction Co.: These are some of the contractors who the defendants extorted into paying illegal fees in order to obtain surety bonds from SIG and its subsidiaries.

d. First Fidelity Bank: The defendants fraudulently induced First Fidelity Bank into making a $7.5 million loan to SIG.

e. Insurance Regulators: Provided with fraudulent information.

f. The United States Government: Provided with fraudulent information.

5. (a, b and c). Describe in detail the pattern of racketeering activity or collection of unlawful debts alleged for each RICO claim:

The defendants committed the following indictable racketeering acts – mail fraud, wire fraud and extortion:

In December of 1987, R. PRUPIS caused the life insurance application for Allen Aldrich, the president of Aldrich Construction, to be mailed from SIG to the insurer in California.

In or around December of 1987, Allen Aldrich signed and mailed the life application and his check to SIG from New Jersey to Florida.

Shortly thereafter, SIG mailed Mr. Aldrich's life application and his check to the life insurance company in California.

In or around April of 1988, the life insurance company mailed the life insurance policy insuring Mr. Aldrich to SIG from California to Florida.

Shortly thereafter, SIG mailed a copy of the life insurance policy to BELLEZZA.

On or about June 22, 1988, N. PRUPIS mailed Linda Burton a letter from New Jersey to Florida in which he requested her to sign a statement which he knew to be false, stating that she had never told anyone that the McKamish bonds had been approved by SIG's Board.

On or about November 11, 1988, ID&T Drywall, Inc. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened that its

failure to make payment "could seriously damage [its] ability to receive future bonding."

On or about November 11, 1988, All Bright Electric, Inc. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

On or about November 11, 1988, Shoemaker Plumbing Co. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

On or about November 11, 1988, SCR Drywall, Inc. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

On or about December 20, 1988, C.I.P.I. Corp. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

On or about December 20, 1988, Agmilu & Co. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

On or about December 20, 1988, Ahmad Construction Co. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened

that its failure to make payment "could seriously damage [its] ability to receive future bonding."

On or about December 20, 1988, AAV Construction Co. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

On or about December 20, 1988, Dale Construction Co. was mailed a bill from CPC for payment of illegal fees. In the past due letter, the contractor was threatened that its failure to make payment "could seriously damage [its] ability to receive future bonding."

In or around April of 1986, BELLEZZA contacted Linda Burton via telephone in Florida from New Jersey, and told her to issue bonds for Aldrich Construction, stating that he would be financially responsible for any losses resulting from the bonds.

In 1987, BELLEZZA, from New Jersey, telephoned R. PRUPIS, in Florida, and discussed lending R. PRUPIS the money to pay off the loan on R. PRUPIS' condominium to SIG.

Also in 1987, BELLEZZA wired $75,000 from New Jersey to Capital Bank for R. PRUPIS.

In or around May of 1987, BELLEZZA telephoned Linda Burton in Florida from New Jersey, to discuss the fee amounts which JJW would pay.

In or around July of 1987, BELLEZZA and Walsh had a telephone conversation (New Jersey to Florida) in which they discussed the fee which would be payable by

JJW to CPC, in addition to the bond premium, to enable JJW to secure the Wellesley Inn Miami Lakes bond.

In or around July of 1987, BELLEZZA, from New Jersey, called Terry Westling, in Florida, and told her to work with his New Jersey attorney, Elliot Kramer of Lampf, Lipkind, to draft the new agreement for execution by JJW.

In or around July of 1987, Ms. Westling telecopied copies of the original agreement to Kramer in New Jersey.

In or around July of 1987, Mr. Kramer amended the original agreement, and on or about that same day telecopied the draft back to Ms. Westling in Florida.

In or around July of 1987, Ms. Westling had the draft retyped, and telecopied copies to BELLEZZA and Kramer for their approval.

In or around July of 1987, Mr. Kramer told Ms. Westling over the telephone (New Jersey to Florida) that the newly drafted agreements were correct.

In or around July of 1987, BELLEZZA directed Ms. Westling via telephone, from New Jersey to Florida, to call Walsh and tell him that he could come to the CPC office and execute the agreement.

In or around September of 1987, Linda Burton, from Florida, informed BELLEZZA, in New Jersey, via telephone, that she needed his signature on the JJW general indemnity agreement.

In or around September of 1987, BELLEZZA, in New Jersey, discussed with R. PRUPIS, in Florida, via telephone, the terms of the September 10, 1987 agreement

with Chief and the terms of BELLEZZA's agreement to indemnify Chief.

On or about September 21, 1987, BELLEZZA sent R. PRUPIS by telecopy, from New Jersey to Florida, a copy of material prepared by Smith Barney to value SIG securities for a debt to equity exchange offering.

On or about December 8, 1987, N. PRUPIS, from New Jersey, telephoned Lynn Day, in Florida, and directed him to telecopy SIG's financial estimates for December 31, 1987. These estimates contained fraudulent financial information.

On or about December 8, 1987, Lynn Day, as directed, telecopied, from Florida, the financial estimates to N. PRUPIS in New Jersey.

In or around December of 1987, BELLEZZA from New Jersey, told Linda Burton, in Florida, via telephone, that he would post a $100,000 letter of credit to satisfy the requirements of a contractor that had applied for bonds to SIG, Cox & Palmer, Inc., for a fee to BELLEZZA, personally, of $40,000.

In or around December of 1987, R. PRUPIS, in Florida, and N. PRUPIS, in New Jersey, spoke via telephone regarding the First Fidelity Bank loan and the personal guarantees.

In 1987 and until May of 1988, unnecessary limousine reservations were made via telephone calls from Florida for SIG personnel traveling to New Jersey. Teresa Waldron, acting at the direction of N. PRUPIS and R. PRUPIS, made at least one of these reservations with Livingston Five Star Limousine.

In or around January of 1988, N. PRUPIS and BELLEZZA, from New Jersey, telephoned R. PRUPIS, in Florida, and discussed and approved the sale of R. PRUPIS' house to Linda Burton, with the accompanying mortgage from SIG.

All Aldrich bonds were approved via telephone or telecopy by BELLEZZA in New Jersey to SIG employees in Florida, including BELLEZZA's approval on the Aldrich bond to the County of Essex, New Jersey on or about February 24, 1988.

In or around February of 1988, BELLEZZA, in New Jersey, instructed Theresa Westling, in Florida, via the telephone, to get Valerie Bellezza's check out.

In or around April of 1988, BELLEZZA, from New Jersey, instructed Linda Burton, in Florida, via the telephone, that the McKamish bonds were to be approved, but he wanted a "piece of the action."

In or around April of 1988, BELLEZZA approved the McKamish bonds in a telephone conversation from New Jersey to Linda Burton, in Florida.

In or around April of 1988, PAULUS approved the McKamish bonds in a telephone conversations from New Jersey to Linda Burton, in Florida.

On or about April 18, 1988, Carl Shible, in Florida, received a telephone call from MEZEY, in New Jersey, who told Shible that the New Jersey directors had been meeting without N. PRUPIS and discussing the excessive spending of R. PRUPIS.

On or about April 18, 1988, Shible, in Florida, received a telephone call from OLSTEIN, in New Jersey,

who told Shible that the New Jersey directors had been meeting without N. PRUPIS and discussing the excessive spending of R. PRUPIS.

On or about April 19, 1988, Shible, in Florida, received a telephone call from MEZEY, from New Jersey. MEZEY told Shible that BELLEZZA and PAULUS wanted to tell N. PRUPIS that they were concerned about the activities of R. PRUPIS. MEZEY asked Shible to ask BECK if Robert A. Beck, Sr. would serve on the Board. All of these phone calls to Shible were designed to fraudulently lead Shible and Beck to believe that the improper activity at SIG would be corrected.

On or about April 21, 1988, BECK and Shible, from Florida, talked by telephone with MEZEY, in New Jersey. MEZEY told BECK and Shible that, at the recent directors meeting, it had been decided to engage a consulting firm to examine the operations of SIG.

On or about May 1, 1988, BELLEZZA, in New Jersey, telephoned BECK, in Florida. BELLEZZA told BECK that he had become convinced that R. PRUPIS should be removed from his position and asked BECK to keep things calm for the next two weeks. BELLEZZA thus fraudulently led BECK to believe that the improper activities at SIG would be corrected and that BECK would remain. This was done in an attempt to prevent BECK from talking to the authorities or the press, until he could be discredited and neutralized.

In or around June of 1988, N. PRUPIS, from New Jersey, called Linda Burton, in Florida, and asked her to sign a false statement addressed to LIPKIND to the effect that the directors had not approved the McKamish bond

request. In fact, BELLEZZA and PAULUS had approved the request. This request was part of an effort to cover up BELLEZZA's manipulation of underwriting requirements to extort money from contractors seeking bonds from the SIG insurance subsidiaries.

From in or around December of 1987 until in or around July of 1988, BELLEZZA, R. PRUPIS, and PERSHES extorted CDR.

From in or around May of 1987 until in or around the fall of 1988, BELLEZZA, PAULUS, R. PRUPIS, N. PRUPIS, PERSHES and LIPKIND extorted JJW.

From in or around the summer of 1987 until in or around July of 1988, BELLEZZA, PAULUS, R. PRUPIS, N. PRUPIS, and PERSHES extorted Chief.

In or around the spring of 1988, BELLEZZA, PAULUS, R. PRUPIS, N. PRUPIS, PERSHES and LIPKIND extorted McKamish.

d. State whether there has been a criminal conviction for violation of the predicate acts:

No.

e. State whether civil litigation has resulted in a judgment in regard to the predicate acts:

Yes – a judgment has been entered in favor of First Fidelity Bank.

f. Describe how the predicate acts form a "pattern of racketeering activity":

The predicate acts form a "pattern of racketeering activity" in that they were all committed in furtherance

of, and reveal a scheme and artifice to defraud and to obtain money and property from Beck, scores of construction companies, shareholders, creditors and governmental entities by means of false and fraudulent pretenses, representations and promises, and to obstruct, delay and affect interstate commerce by means of extortion.

The illegal acts committed by the Defendants were not sporadic or isolated incidents. The multiple acts of racketeering activity by the Defendants were interrelated, formed part of a common and continuous pattern of fraudulent schemes that were perpetrated over several years with the same or similar intent, were committed by the same or similar methods, and had the same or similar victims.

g. State whether the alleged predicate acts relate to each other as part of a common plan:

The predicate acts relate to each other as part of a common plan by which the defendants sought to profit from the enterprise by means of fraud and extortion. The predicate acts were committed in furtherance of this plan. Through the predicate acts, SIG and its subsidiaries were looted and scores of construction companies were extorted. Moreover, Beck and other shareholders and creditors were defrauded into turning over substantial funds to the defendants' enterprise. When Beck became a threat to the defendants' continued criminal conduct, the defendants committed several criminal acts to silence and neutralize Beck. Other criminal, predicate acts were employed to keep the truth from insurance regulators

and other governmental entities so that the Defendants could continue their improper conduct.

6. (a and b). Describe in detail the alleged enterprise for each RICO claim:

The enterprise, SIG, is composed of a holding company and several operating subsidiaries, the majority of which were engaged in the surety/insurance industry.

(c, d, e and f). State whether any defendants are employees, officers, or directors of the alleged enterprise:

The defendants were all either senior officers or directors of SIG. As such, they are not the enterprise, itself. None of the defendants are *merely* associated with the enterprise. All of the defendants are perpetrators of the alleged racketeering activity.

7. State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity:

The pattern of racketeering activity alleged and the enterprise are separate and have not merged into one entity. The enterprise itself consisted of a holding company and its subsidiaries, which are involved primarily in the insurance industry. The pattern of racketeering activity is the manifestation of the defendants' plan to use fraud and extortion in the conduct of the enterprise's affairs for pecuniary gain. The corporations themselves were not a "pattern of racketeering activity" and, although such activity was extensive, not all of the enterprise's business was conducted in this manner.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all:

The enterprise dealt primarily with insurance and surety. The pattern of racketeering activity played a significant role in the manner in which the defendants conducted the enterprise. Construction companies desiring bonds were extorted. Records and financial statements were falsified. The enterprise was looted by the defendants. Employees were "paid off" to either participate or remain silent. While the pattern of racketeering was extensive, not all of the enterprise's daily activities were conducted in this fashion.

9. Describe what benefits, if any, the alleged enterprise received from the alleged pattern of racketeering:

The enterprise did receive some short-term benefits from the pattern of racketeering activity (such as investments, loans and extortion proceeds). As part of the pattern of racketeering activity, however, the defendants looted SIG, causing its eventual failure.

10. Describe the effect of the activities of the enterprise on interstate or foreign commerce:

The activities of the enterprise affected interstate commerce in, at least, the following ways: (1) the enterprise was involved in the interstate use of mail and wires; (2) the enterprise used materials and supplies manufactured outside the state; (3) the enterprise provided its insurance services both to out-of-state firms and to local

firms that do business out-of-state; (4) the majority of the enterprise's senior officers and directors were citizens of other states; (5) many of the enterprise's shareholders and creditors were based in other states; and (6) many of the contractors that the defendants extorted through its corrupt use of the enterprise were involved in matters which affect interstate commerce.

11. If the complaint alleges a violation of 18 U.S.C. §1962(a), provide the following information:

a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt:

The income derived from the pattern of racketeering activity was received by all of the defendants in the form of salaries, dividends, commissions, interest and other fees as a result of their participation in the racketeering activity.

b. Describe the use or investment of such income:

Each of these defendants used or invested, directly or indirectly, all or a part of that income to maintain their illegitimate interest in SIG. For example, the defendants utilized this income to loan money to and/or invest in SIG, commit predicate acts, discredit Beck, and buy the loyalty/silence of numerous individuals.

12. If the complaint alleges a violation of 18 U.S.C. §1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise:

Each of the defendants used or invested, directly or indirectly, all or a part of the above-described income to maintain their interest in or control of SIG. *See* Answer to Question 7, *supra*. For example, some of this income was used by the defendants to invest in and/or extend loans to SIG, to facilitate predicate acts, and to buy the loyalty/silence of numerous individuals.

13. If the complaint alleges a violation of 18 U.S.C. §1962(c), provide the following information:

a. State who is employed by or associated with the enterprise:

All defendants.

b. State whether the same entity is both the liable "person" and the "enterprise" under §1962(c):

No.

14. If the complaint alleges a violation of 18 U.S.C. §1962(d), describe in detail the alleged conspiracy:

The defendants agreed and conspired among themselves and with others to engage, directly and indirectly, in the conduct of the enterprise's affairs through a pattern of racketeering activity; to use income or the proceeds of income derived from the pattern of racketeering to establish and operate the enterprise; and to acquire and maintain an interest and control of the enterprise. *See also* Answers to Questions 2, 5, 11 and 12, *supra*.

15. Describe the alleged injury to business or property:

See Answer to Question 17, *infra*.

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute:

As a direct result of the defendants' scheme and artifice, Beck was induced to personally guarantee loans and extend credit to/invest in SIG. The defendants' continued violations of the RICO statute resulted in the failure of SIG, causing substantial losses to Beck. Additionally, the defendants fraudulently created causes to terminate Beck and fraudulently damaged his reputation to neutralize his threat to and to create a scapegoat for their continued pattern of racketeering activity.

17. List the damages sustained by reason of the violation of §1962, indicating the amount for which each defendant is liable for treble damages:

Beck suffered the following damages by reason of the defendants' violations of §1962, for which each defendant is liable for treble damages:

TYPE OF INJURY	AMOUNT
Unsecured Loan to SIG	$150,000.00
Loss of Employment	$1,368,741.00
Guaranty of Loan	unknown at this time
Loss of Stock Value	$828,234.00
Attorneys' Fees	unknown at this time
Costs	unknown at this time

18. List all other federal causes of action, if any, and provide the relevant statute numbers:

None.

19. Provide any additional information that you feel would be helpful to the court in processing your RICO claim.

Beck's claims were originally crossclaims/third party claims in a New Jersey federal action by investors and shareholders of SIG against the defendants and others. Beck's claims were severed and transferred to the Southern District of Florida. The attorneys who represented the investors/shareholders of SIG in the original action were disqualified as a result of a conflict of interest. Thereafter, the plaintiffs' in that action were unable to pursue the claim due to a lack of funding.

Respectfully submitted,

Elizabeth J. du Fresne
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By: /s/ Jay Starkman
Jay Starkman
Fla. Bar No. 771953

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail this 26th day of April, 1994 to all counsel on that attached service list.

By: /s/ Jay Starkman
Jay Starkman

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Exhibit "A"
Defendant Beck's Crossclaim and
Third Party Complaint
Case No. 89-3389xx AJL
Appears at pages 54 to 136 of this Joint Appendix
and, therefore, is not duplicated here

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

ROBERT A. BECK, II,

Plaintiff,

v.

RONALD M. PRUPIS, et al.,

Defendants.
_____/

CASE NO. 91-8121-CIV-ROETTGER

ANSWER OF DEFENDANTS BELLEZZA, OLSTEIN, PAULUS AND SABATO TO PLAINTIFF ROBERT A. BECK, II'S CROSSCLAIMS AND THIRD-PARTY CLAIM

Third-party defendants Leonard Bellezza ("Bellezza"), Harry Olstein ("Olstein"), William Paulus, Jr. ("Paulus") and Ernest Sabato ("Sabato") by way of answer to crossclaims and third-party claims of Robert A. Beck, II ("Beck") state as follows:

I. NATURE OF THE ACTION

1. Third-party defendants deny the allegations contained in paragraph 1.

2. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 2.

3. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 3.

II. THE PARTIES

4. These third-party defendants have insufficient knowledge to form a belief as to Beck's residency. These third-party defendants admit that until May 13, 1986 Beck was president of Southeastern Insurance Group, Inc. ("SIG").

5. These third-party defendants admit that they are citizens of the State of New Jersey. These third-party defendants have in sufficient [sic]-knowledge to form a belief as to the remaining allegations contained in paragraph 5.

6. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations regarding Firemark's principal place of business. Third-party defendants deny that Firemark was an agent of the senior officers and directors of SIG, but admit that Firemark was a consultant to SIG. These third-party defendants have insufficient knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 6.

7. These third-party defendants admit that SIG was a Florida corporation which, until January 5, 1990, had its principal place of business in Florida and that on January 5, 1990, SIG filed a petition for bankruptcy in the Southern District of Florida. These defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 7.

8. These third-party defendants deny the allegations contained in paragraph 8.

9. These third-party defendants deny each and every allegation contained in paragraph 9.

10. These third-party defendants deny the allegations contained in paragraph 10.

III. GENERAL ALLEGATIONS

A. SCHEME AND ARTIFICE TO DEFRAUD, TO OBTAIN MONEY AND PROPERTY AND TO INTERFERE WITH COMMERCE BY MEANS OF EXTORTION

11. These third-party defendants deny each and every allegation contained in paragraph 11.

12. These third-party defendants deny each and every allegation contained in paragraph 12.

13. These third-party defendants deny each and every allegation contained in paragraph 13.

14. These third-party defendants deny each and every allegation contained in paragraph 14.

15. These third-party defendants deny each and every allegation contained in paragraph 15.

16. These third-party defendants deny each and every allegation contained in paragraph 16.

17. These third-party defendants deny each and every allegation contained in paragraph 17.

a. Fraudulent Financial Statements

18. These third-party defendants deny each and every allegation contained in paragraph 18.

19. These third-party defendants deny each and every allegation contained in paragraph 19.

20. These third-party defendants deny each and every allegation contained in paragraph 20.

21. These third-party defendants deny each and every allegation contained in paragraph 21.

22. These third-party defendants deny each and every allegation contained in paragraph 22.

b. Extortion of Contractors

23. These third-party defendants deny each and every allegation contained in paragraph 23.

24. These third-party defendants deny each and every allegation contained in paragraph 24.

25. These third-party defendants deny each and every allegation contained in paragraph 25.

26. These third-party defendants deny each and every allegation contained in paragraph 26.

27. These third-party defendants deny each and every allegation contained in paragraph 27.

28. These third-party defendants deny each and every allegation contained in paragraph 28.

29. These third-partly defendants deny each and every allegation contained in paragraph 29.

30. These third-party defendants deny each and every allegation contained in paragraph 30.

c. **Aside Fraud**

31. These third-party defendants deny each and every allegation contained in paragraph 31.

d. **Fraudulent Promises to Identify**

32. These third-party defendants deny each and every allegation contained in paragraph 32

e. **Compensation Committee Abuses**

33. These third-party defendants deny each and every allegation contained in paragraph 33.

f. **Improper and Unnecessary Legal Fees**

34. The allegations contained in paragraph 34 do not refer to these third-party defendants and are therefore denied.

35. The allegations contained in paragraph 35 do not refer to these third-party defendants and are therefore denied.

g. **Attempted Options Fraud**

36. These third-party defendants deny each and every allegation contained in paragraph 36.

h. **Other Abuses**

37. These third-party defendants deny each and every allegation contained in paragraph 37.

38. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 38.

39. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 39.

40. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 40.

41. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 41.

B. **RACKETEERING ACTIVITY DIRECTED AGAINST BECK**

42. These third-party defendants deny each and every allegation contained in paragraph 42.

a. **Termination "For Cause"**

43. These third-party defendants admit the allegations contained in paragraph 43.

44. These third-party defendants deny each and every allegation contained in paragraph 44.

45. These third-party defendants deny each and every allegation contained in paragraph 45.

46. These third-party defendants deny each and every allegation contained in paragraph 46.

47. These third-party defendants deny each and every allegation contained in paragraph 47.

48. These third-party defendants deny each and every allegation contained in paragraph 48.

49. These third-party defendants deny each and every allegation contained in paragraph 49.

50. These third-party defendants deny each and every allegation contained in paragraph 50.

51. These third-party defendants deny each and every allegation contained in paragraph 51.

52. These third-party defendants deny each and every allegation contained in paragraph 52.

53. These third-party defendants deny each and every allegation contained in paragraph 53.

54. These third-party defendants deny each and every allegation contained in paragraph 54.

55. These third-party defendants deny each and every allegation contained in paragraph 55.

56. These third-party defendants admit the allegations contained in paragraph 56.

57. These third-party defendants deny each and every allegation contained in paragraph 57.

58. These third-party defendants admit the allegations contained in paragraph 58.

59. These third-party defendants deny each and every allegation contained in paragraph 59.

60. These third-party defendants deny each and every allegation contained in paragraph 60.

b. Personal Guarantees

61. These third-party defendants deny each and every allegation contained in paragraph 61.

62. These third-party defendants deny each and every allegation contained in paragraph 62.

63. These third-party defendants deny each and every allegation contained in paragraph 63.

64. These third-party defendants deny each and every allegation contained in paragraph 64.

65. These third-party defendants deny each and every allegation contained in paragraph 65.

66. These third-party defendants deny each and every allegation contained in paragraph 66.

67. These third-party defendants deny each and every allegation contained in paragraph 67.

68. These third-party defendants deny each and every allegation contained in paragraph 68.

69. These third-party defendants deny each and every allegation contained in paragraph 69.

70. These third-party defendants deny each and every allegation contained in paragraph 70.

71. These third-party defendants deny each and every allegation contained in paragraph 71.

72. These third-party defendants deny each and every allegation contained in paragraph 72.

73. These third-party defendants deny each and every allegation contained in paragraph 73.

c. **Unsecured Loan**

74. These third-party defendants do not have sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 74.

75. These third-party defendants deny each and every allegation contained in paragraph 75.

76. These third-party defendants deny each and every allegation contained in paragraph 76.

77. These third-party defendants deny each and every allegation contained in paragraph 77.

78. These third-party defendants deny each and every allegation contained in paragraph 78.

d. **Predicate Acts**

79. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 79.

80. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 80.

81. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 81.

82. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 82.

83. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 83.

84. These third-party defendants deny each and every allegation contained in paragraph 84.

85. These third-party defendants deny each and every allegation contained in paragraph 85.

86. These third-party defendants deny each and every allegation contained in paragraph 86.

87. These third-party defendants deny each and every allegation contained in paragraph 87.

88. These third-party defendants deny each and every allegation contained in paragraph 88.

89. These third-party defendants deny each and every allegation contained in paragraph 89.

90. These third-party defendants deny each and every allegation contained in paragraph 90.

91. These third-party defendants deny each and every allegation contained in paragraph 91.

92. These third-party defendants deny each and every allegation contained in paragraph 92.

93. These third-party defendants deny each and every allegation contained in paragraph 93.

94. These third-party defendants deny each and every allegation contained in paragraph 94.

95. These third-party defendants deny each and every allegation contained in paragraph 95.

96. These third-party defendants deny each and every allegation contained in paragraph 96.

97. These third-party defendants deny each and every allegation contained in paragraph 97.

98 . These third-party defendants deny each and every allegation contained in paragraph 98.

99. These third-party defendants deny each and every allegation contained in paragraph 99.

100. These third-party defendants deny each and every allegation contained in paragraph 100.

101. These third-party defendants deny each and every allegation contained in paragraph 101.

102. These third-party defendants deny each and every allegation contained in paragraph 102.

103. These third-party defendants deny each and every allegation contained in paragraph 103.

104. These third-party defendants deny each and every allegation contained in paragraph 104.

105. These third-party defendants deny each and every allegation contained in paragraph 105.

106. These third-party defendants deny each and every allegation contained in paragraph 106.

107. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegation contained in paragraph 107.

108. These third-party defendants deny each and every allegation contained in paragraph 108.

109. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 109.

110. These third-party defendants deny each and every allegation contained in paragraph 110.

111. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 111.

112. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 112.

113. These third-party defendants deny each and every allegation contained in paragraph 113.

114. These third-party defendants deny each and every allegation contained in paragraph 114.

115. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 115.

116. These third-party defendants deny each and every allegation contained in paragraph 116.

117. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 117.

118. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 118.

119. These third-party defendants do not have sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 119.

120. These third-party defendants do not have sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 120.

121. These third-party defendants deny each and every allegation contained in paragraph 121.

122. These third-party defendants have insufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 122.

123. These third-party defendants deny each and every allegation contained in paragraph 123.

124. These third-party defendants deny each and every allegation contained in paragraph 124.

125. These third-party defendants deny each and every allegation contained in paragraph 125.

126. These third-party defendants deny each and every allegation contained in paragraph 126.

127. These third-party defendants deny each and every allegation contained in paragraph 127.

128. These third-party defendants deny each and every allegation contained in paragraph 128.

COUNT I

129. These third-party defendants repeat their answers to paragraphs 1 through 128 as if fully set forth herein at length.

130. These third-party defendants deny each and every allegation contained in paragraph 130.

131. These third-party defendants deny each and every allegation contained in paragraph 131.

132. These third-party defendants deny each and every allegation contained in paragraph 132.

133. These third-party defendants deny each and every allegation contained in paragraph 133.

134. These third-party defendants deny each and every allegation contained in paragraph 134.

135. These third-party defendants deny each and every allegation contained in paragraph 134 [sic].

COUNT II

136. These third-party defendants repeat their answers to paragraphs 1 through 132 and 135 as if fully set forth herein at length.

137. These third-party defendants deny each and every allegation contained in paragraph 137.

138. These third-party defendants deny each and every allegation contained in paragraph 138.

COUNT III

139. These third-party defendants repeat their answers to paragraphs 1 through 132 and 135 as if fully set forth herein at length.

140. These third-party defendants deny each and every allegation contained in paragraph 140.

141. These third-party defendants deny each and every allegation contained in paragraph 141.

COUNT IV

142. These third-party defendants repeat their answers to paragraphs 1 through 141 as if fully set forth herein at length.

143. These third-party defendants deny each and every allegation contained in paragraph 143.

144. These third-party defendants deny each and every allegation contained in paragraph 144.

145. These third-party defendants deny each and every allegation contained in paragraph 145.

COUNT V

146. These third-party defendants repeat their answers to paragraphs 1 through 78 as if fully set forth herein at length.

147. These third-party defendants deny each and every allegation contained in paragraph 147.

148. These third-party defendants deny each and every allegation contained in paragraph 148.

149. These third-party defendants deny each and every allegation contained in paragraph 149.

150. These third-party defendants deny each and every allegation contained in paragraph 150.

151. These third-party defendants deny each and every allegation contained in paragraph 151.

COUNT VI

152. These third-party defendants repeat their answers to paragraphs 1 through 78 and 147 through 150 as if fully set forth herein at length.

153. These third-party defendants deny each and every allegation contained in paragraph 153.

COUNT VII

154. These third-party defendants repeat their answers to paragraphs 1 through 78 as if fully set forth herein at length.

155. These third-party defendants deny each and every allegation contained in paragraph 155.

156. These third-party defendants deny each and every allegation contained in paragraph 156.

157. These third-party defendants deny each and every allegation contained in paragraph 157.

158. These third-party defendants deny each and every allegation contained in paragraph 158.

159. These third-party defendants deny each and every allegation contained in paragraph 159.

COUNT VIII

160. These third-party defendants repeat their answers to paragraphs 1 through 78 and 155 through 158 as if fully set forth herein at length.

161. These third-party defendants deny each and every allegation contained in paragraph 161.

COUNT IX

162. These third-party defendants repeat their answers to paragraphs 1 through 78 as if fully set forth herein at length.

163. These third-party defendants deny each and every allegation contained in paragraph 163.

164. These third-party defendants deny each and every allegation contained in paragraph 162 [sic].

165. These third-party defendants deny each and every allegation contained in paragraph 165.

166. These third-party defendants deny each and every allegation contained in paragraph 166.

167. These third-party defendants deny each and every allegation contained in paragraph 167.

168. These third-party defendants deny each and every allegation contained in paragraph 168.

COUNT X

169. These third-party defendants repeat their answers to paragraphs I through 78 and 163 through 167 as if fully set forth herein at length.

170. These third-party defendants deny each and every allegation contained in paragraph 168 [sic].

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Beck has failed to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Beck's claims are barred by the doctrine of collateral estoppel.

THIRD AFFIRMATIVE DEFENSE

Beck's claims are barred by the doctrine of *res judicata*.

FOURTH AFFIRMATIVE DEFENSE

Beck's claims are barred by the applicable law of this Circuit.

FIFTH AFFIRMATIVE DEFENSE

Beck's claims are barred by the doctrine of unclean hands.

SIXTH AFFIRMATIVE DEFENSE

Beck's claims are barred by the doctrine of judicial estoppel.

SEVENTH AFFIRMATIVE DEFENSE

Beck's claims must be stayed due to the filing of personal bankruptcy by defendant, Ronald M. Prupis.

EIGHTH AFFIRMATIVE DEFENSE

In exercising their responsibilities, defendants Bellezza, Olstein, Paulus and Sabato relied upon the advice of their advisors and consultants, and therefore acted in good faith.

NINTH AFFIRMATIVE DEFENSE

In exercising their responsibilities, defendants Bellezza, Olstein, Paulus and Sabato relied upon the advice and reports of Beck.

CROSS-CLAIMS

FIRST COUNT

1. To the extent Beck's crossclaims and third-party claims allege mismanagement, and while denying any acts of mismanagement and while also denying any acts which comprise Beck's RICO predicate acts, defendants Bellezza, Olstein, Paulus and Sabato are entitled to contribution from their co-Board members and officers for all

decisions made by the Board which allegedly bear upon the allegations of the complaint.

WHEREFORE, defendants Bellezza, Olstein, Paulus and Sabato demand a judgment for contribution from the remaining defendants.

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By: /s/ Kenneth R. Hartmann
KENNETH R. HARTMANN
Florida Bar No. 664286

DATED: August 15, 1994

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to all parties on the attached service list on this 15th day of August, 1994.

By: /s/ Kenneth R. Hartmann
KENNETH R. HARTMANN

Beck v. Prupis, et al.
Case No. 91-8121-CIV-ROETTGER

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-8121-CIV-ROETTGER

ROBERT A. BECK, II,

Plaintiff,

v.

ROBERT M. PRUPIS, et al.

Defendants.

_____/

DEFENDANT BELLEZZA GROUP'S MOTION FOR SUMMARY JUDGMENT

Defendants Leonard Bellezza, Ernest J. Sabato, William Paulus and Harry Olstein ("the Bellezza Group"), by and through their undersigned counsel hereby move the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 7.5 of the Local Rules of the United States District Court for the Southern District of Florida, for entry of Summary Judgment on all claims asserted against the Bellezza Group in Plaintiff ROBERT A. BECK II's ("Beck"), Cross Claim and Third-Party Claim ("Complaint"), and in support thereof states as follows:

This is an action by plaintiff seeking damages against eleven former officers and directors of Southeastern Insurance group, Inc. ("SIG") for their alleged violation of the Racketeer Influenced and Corrupt Organizations Act 18 U.S.C. § 1961 *et. seq.* ("RICO") and of Florida common law. Beck is a disgruntled ex-President, former shareholder and creditor of SIG who alleges that defendants carried on the affairs of SIG through a pattern of

racketeering activity directed at third parties, which had the effect of injuring SIG and its operating insurance subsidiaries.

As set forth in the accompanying Memorandum of Law, however, Beck merely alleges damages that occurred only *derivatively*, as an indirect result of SIG's demise and bankruptcy. The law of the Eleventh Circuit, and every other Court in the United States, is that shareholders, creditors, and terminated employees do not have standing under RICO to sue for racketeering injuries sustained directly by the corporation and only derivatively by them.

Therefore, there being no genuine issue of material fact, the RICO claims (Counts I through IV) must be dismissed as a matter of law. For the same reasons, the common law claims (Counts V through X) must be dismissed as well. Even if the Court does not dismiss the common law claims on substantive grounds, if the court dismisses the RICO claims it should decline to exercise supplemental jurisdiction over the common law claims. 28 U.S.C. § 1367(c)(3).

WHEREFORE, defendants Leonard Bellezza, Ernest J. Sabato, William Paulus and Harry Olstein respectfully

request that this Court grant their Motion for Summary Judgment and dismiss Plaintiff's Complaint.

Respectfully submitted,

BUDD LARNER GROSS
ROSENBAUM GREENBERG &
SADE, P.C.
Attorneys for Defendants
Leonard Bellezza, Harry Olstein,
William Paulus, Jr. and
Ernest J. Sabato

BY: _____
MICHAEL M. ROSENBAUM

DATED: March 29, 1995

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the following:

1. Defendant Bellezza Group's Motion for Summary Judgment

2. Memorandum of Law in Support of Defendants' The Bellezza Group's Motion for Summary Judgment

3. Defendants the Bellezza Group's Statement of Material Facts

4. Defendant Bellezza Group's Request for Oral Argument on Motion for Summary Judgment

was hand-delivered to Jay Starkman, Esq., Starkman & Magolnick, P.A., Museum Tower, Suite 2701, 150 West Flagler Street, Miami, Florida, and furnished by U.S. Mail

this 30th day of March, 1995 to all counsel of record as listed on the attached service list.

By: Kenneth R. Hartmann
KENNETH R. HARTMANN

Beck v. Prupis, et al.
Case No. 91-8121-CIV-ROETTGER
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-8121-CIV-ROETTGER

ROBERT A. BECK, II,

Plaintiff,

v.

ROBERT M. PRUPIS, et al.

Defendants.
_____/

DEFENDANTS THE BELLEZZA GROUP'S STATEMENT OF MATERIAL FACTS

Defendants Leonard Bellezza, William Paulus, Ernest J. Sabato, and Harry Olstein (the "Bellezza Group"), by and through their undersigned counsel hereby file this Statement of Material Facts in support of their Motion for Summary Judgment, and state as follows:

For the purposes of this summary judgment motion only, we have relied on Mr. Beck's allegations in his RICO case information statement ("CIS") and his deposition. Assuming the accuracy of Mr. Beck's testimony, there is no RICO standing. Indeed, Mr. Beck's testimony concedes away his claim.

The Allegations

Plaintiff Robert A. Beck II is the former President, director and shareholder of Southeastern Insurance Group ("SIG"), which from 1983 until it declared bankruptcy in January 1990 was an insurance holding

company that wholly-owned three operating insurance subsidiaries: Southeastern Casualty & Indemnity Insurance Co., Inc. ("SCI-Fla"), Southeastern Casualty and Indemnity Insurance Company of New Jersey, Inc. ("SCI-NY"), and Southeastern Reinsurance Company, Inc. ("SRC") (collectively "the Insurance Subsidiaries"). The Insurance Subsidiaries wrote surety bonds for construction contractors.

Defendants Leonard Bellezza, William Paulus, Jr., Ernest Sabato, and Harry Olstein ("the Bellezza Group") were all SIG directors who Beck alleges conducted the affairs of SIG through a pattern of racketeering activity. Beck generally claims that defendants (1) allowed the Insurance Subsidiaries to charge contractors unauthorized fees; (2) allowed the Insurance Subsidiaries to loan funds to the parent corporation (SIG), who used the money to pay legitimate SIG debt, (3) and that when agreeing to guaranty a $7.5 million bank loan by First Fidelity to SIG, he was unaware of loans made by SIG to a contractor (Chief Structures) who was experiencing cash flow difficulty. Beck claims the Chief loans should have been treated as claims on the Insurance Subsidiaries' financial statements (which they were). Treating the loans as claims would reduce the profits of the Insurance Subsidiaries. (Exhibit A,[1] ¶¶ 13-41; Exhibit B, ¶2).[2]

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[1] Documents and excerpts from depositions are annexed to the Certification of Michael M. Rosenbaum dated March 28, 1995.

[2] Plaintiff's pleadings are thick with references to RICO buzzwords such as "looting" and "extortion." However, when pressed in deposition, Beck conceded that "looting" merely means that defendants made intercompany transfers to pay

As a result of these complained-of activities, Beck alleges four categories of injury he sustained, all of which flow from the demise of SIG and its Insurance Subsidiaries. He seeks damages for: (1) the loss of the value of stock that he purchased in 1983 and in a Private Placement in August 1986; (2) the loss of $150,000, an unsecured loan to SIG in the form of debenture bonds purchased in the Private Placement; (3) the loss of employment occasioned when defendants supposedly created fraudulent causes for his May 1988 termination in order to prevent him from blowing the whistle on their alleged improper activities; (4) unspecified damages arising from his personal guaranty of First Fidelity Bank's $7.5 million loan to SIG in December 1987, which SIG defaulted on when it went bankrupt. (Exhibit A, ¶¶ 13-15, 42-78, Exhibit B, ¶ 17).[3]

The Procedural History

Beck's vendetta began in May 1988, when Firemark, an independent insurance consulting firm, determined that SIG's upper management was dysfunctional and recommended the termination of Beck as SIG's President

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legitimate corporate debts; and that "extortion" merely means that, as a condition of getting a bond, contractors were sometimes required to pay monitoring fees to CPC, a SIG subsidiary that monitored the construction projects to prevent the contractors from defaulting. (Exhibit D).

[3] Counts I through IV allege violations of RICO §§ 1962(a)-(d). Counts V through X allege fraud and negligence regarding the termination of Beck's employment, his execution of the First Fidelity Guaranty, and his purchase of the debentures.

and Ron Prupis as SIG's CEO. Based on that recommendation, the Board of Directors terminated Beck and other senior officers. (Exhibit C). Claiming he was terminated because he was threatening to "blow the whistle" on those who were mismanaging SIG, Beck filed a lawsuit on May 15, 1989 in Florida state court against the officers and directors of SIG – including the Bellezza Group – alleging violations of Florida's RICO statute and various common law claims ("the Florida action") (Exhibit E). That state RICO suit made the very same RICO allegations as in this federal action.

In August 1989, just after Beck filed his Florida action, SIG shareholders – with Beck's cooperation – filed a derivative action in the federal District Court of New Jersey patterned after Beck's Florida RICO Complaint ("the shareholders action"). The shareholders sued all of SIG's officers and directors – including the Bellezza Group – for various securities and RICO violations.[4] (Exhibit F). When SIG declared bankruptcy in January 1990, the shareholders' action was taken over by SIG's bankruptcy trustee, Jules Bagdan. (Exhibit G).

Beck's RICO allegations in his Florida suit, and the shareholders' allegations in the derivative RICO action, were identical to Beck's RICO allegations here. They included claims that defendants committed the very same RICO predicate acts as set forth in this suit.

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[4] The securities claims arose out of SIG's August 1986 Private Placement of common stock and debentures (collectively "Units"). The RICO claims arose out of defendants' later conduct in 1987-89 that Beck complains about here.

On November 28, 1989, the Florida state court dismissed Beck's substantive RICO claims, holding that he lacked RICO standing to sue as a terminated whistleblower.[5] (Exhibit H). All that remained was a RICO conspiracy claim, which Beck withdrew after the Eleventh Circuit held that discharged ernployees who were threatening to "blow the whistle" did not have standing to sue for RICO damages. (Exhibit J).

Undaunted by the dismissals, and in an obvious attempt to forum shop, Beck immediately refiled his Florida RICO action as a cross-claim in the New Jersey shareholders' action. (Exhibit A). Beck's federal RICO cross-claim alleges the same series of events as those alleged in his previously-dismissed Florida action. The RICO claims brought by the shareholders and taken over by SIG's bankruptcy trustee were all ultimately dismissed. (Exhibit K). But Beck's cross-claim, for which a dismissal motion was pending, was transferred to this Court because of the forum selection clause in Beck's employment contract. (Exhibit L). The Beck Cross-claim will be referred to herein as "the Complaint."

Meanwhile, in August 1989, the Florida Department of Insurance placed the Florida Insurance Subsidiaries, SCI-Fla and SRC, into Receivership for the purpose of marshalling their assets and liquidating them. The New Jersey Department of Insurance also placed the New Jersey Insurance Subsidiary (SCI-NJ) into receivership.

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[5] The trial judge was sufficiently dismayed at the frivolousness of Beck's RICO claims that he awarded attorneys fees to the Bellezza Group, though this fee award was vacated by the Florida appellate court. (Exhibit 1)

(Exhibit M). In late 1990 and early 1991, the Florida Receiver – with Beck's cooperation – filed actions in Florida state court on behalf of SRC and SCI-Fla against SIG officers and directors, including the Bellezza Group, making the same allegations as Beck makes here. As with the Beck complaint here, the Florida Receiver's complaint alleged improprieties concerning intracompany transfers of funds, breaches of fiduciary duty, and statutory violations, (Exhibit N), conduct identical to Beck's instant allegations of "looting" and mismanagement. The New Jersey Department of Insurance also sued the Bellezza Group and other officers and directors, claiming that a pooling agreement amongst the Insurance Subsidiaries was invalid and led to the demise of the SCI-NJ. (Exhibit O).

The New Jersey Insurance Department's suit was dismissed in June 1994, and the Florida Receiver's suits were settled. The settlement proceeds are to be used by the Florida Receiver for the benefit of the creditors, shareholders, which include SIG and its shareholders (including Beck), and bond obligees of the Florida companies. (Exhibit P). Beck certainly has no RICO standing to sue for the very same injuries which were the subject of the lawsuits brought by the Florida and New Jersey Receivers and by SIG's Bankruptcy Trustee and for which these defendants already paid a substantial settlement for the Florida Receiver. These defendants cannot be called upon to pay twice for the same alleged wrongful conduct.

As the following chart shows, the proper parties with standing – the Receiver and Bankruptcy Trustee – have already asserted the same allegations Beck makes herein in prior derivative actions:

BECK COMPLAINT	PREVIOUS LAWSUITS[6]
(1) Looting of Insurance Subsidiaries – Intracompany transfers (upstreaming of funds to pay SIG debts) – Reinsurance pooling – Inflated/Unnecessary Salaries – Excessive travel/entertainment expenses – Excessive use of limousines and purchases of luxury automobiles – Excessive L2P2 attorney fees – Purchasing an employee's condominium and extending mortgages without Board approval ¶¶ 18-22, 31-40	(1) Bagdan: ¶¶73(a)-(d), 74(i)-(l) SRC: ¶¶ 7-35 SCI/Fla: ¶¶ 10-33 Beck State Rico: ¶¶ 32(A), 32(K)

[6] "Bagdan" denotes the New Jersey shareholders' action, which was taken over by Jules Bagdan, SIG's Trustee in Bankruptcy. "SRC" denotes the Florida Receiver's action brought on behalf of Southeastern Reinsurance. "SCI-Fla" denotes the Receiver's action brought on behalf of Southeastern Casualty of Florida. "Beck State RICO" denotes the state law RICO suit that Beck brought in 1989, which was dismissed.

(2) Fraudulent Financial Statement - Understating loss reserves and claims - Inflating assets - Financial statements submitted to Florida Insurance Regulators - Financial estimates given to First Fidelity Bank for $7.5 million loan ¶¶ 18-22, 61-73	(2) Bagdan: ¶¶ 74(f) & (l) SRC: ¶¶ 7-12 Beck State Rico: ¶¶ 32(a)(1)(g) 32(G), 36-38
(3) Extortion of Contractors - Contractors' payment of monitoring fees to CPC ¶¶ 23-30	(3) Bagdan: ¶74(b) Back State RICO: ¶32(C)
(4) Termination of Beck for Cause ¶¶ 43-60	(4) Beck State RICO: ¶¶ 19-32, 39-54

As the above chart illustrates, the parties with proper legal standing – SIG's Bankruptcy Trustee and the Insurance Subsidiaries' Florida Receiver – have already brought suit to vindicate the companies' rights regarding defendants' alleged "looting," mismanagement, fraudulent financial statements and "extortion" of contractors. Moreover, Beck himself has previously brought a RICO suit in Florida state court to complain about these same

wrongdoings and to seek damages as a terminated whistleblower. Beck simply does not have standing under RICO to sue for predicate acts practiced against – and injuring – those corporations.

Beck's Deposition Testimony

This case boils down to whether Beck has "standing" to assert RICO claims. Beck's own extensive deposition testimony confirms that all of his alleged RICO injuries derive entirely from SIG's demise, which he alleges resulted from a pattern of racketeering activity practiced upon SIG, its Subsidiaries, and other third parties such as contractors.

As stated above, Beck alleges four categories of damage arising from defendants' alleged RICO conduct:

(1) The loss of an unsecured loan to SIG of $150,000 (debenture bonds purchased in the August 1986 Private Placement)

(2) The loss of Stock Value, $828,234

(3) The loss of Employment, $1,368,741

(4) Guaranty of First Fidelity loan (unspecified damages)

(Exhibit B, ¶17).

Stock and Debenture Injuries

With respect to the loss of stock value and the $150,000 loan, clearly these "injuries" resulted from the demise of SIG, which Beck alleges resulted from the RICO predicate acts allegedly practiced upon the Insurance

Subsidiaries. Beck's loss of his indebtedness and stock value occurred because the companies went bankrupt and could not repay him. Beck agreed on numerous occasions that the alleged RICO predicate acts were intended to and did damage the Insurance Subsidiaries first, then their parent holding company, SIG, and also the contractors who were supposedly extorted, First Fidelity, and finally and only derivatively, shareholders and creditors such as Beck who lost the value of their investments/ loans when SIG went bankrupt. (Exhibit Q).

For example, Beck testified that the "looting" of Insurance Subsidiaries (defined by Beck himself as the mere "upstreaming" of the Insurance Subsidiaries' funds to pay SIG's legitimate debts), and the writing of high risk bonds, caused injury to SIG and the Insurance Subsidiaries:

Q. So the entity that was hurt by the upstreaming to enable SIG to pay its debts was the surety companies that upstreamed the money, correct? Yes or no?

A. No.

Q. It wasn't hurt?

A. It was hurt but that's not the only entities.

Q. I will give you a chance to finish. ***Was the surety company hurt?***

A. ***Yes.***

Q. ***How?***

A. ***Because it took out of the company policyholders surplus and unearned premium reserves out of the company illegally and***

made the companies unable to pay their debts.

Q. So the first instance or at least one instance, the surety company was hurt, correct?

A. Yes.

Q. And the fallout from that was that the entities or companies to whom those bonds were issued, if there was a default on those bonds, would not receive the proceeds from the bond; is that correct?

A. Yes.

Q. Was there any other hurt?

A. Yes. The regulators were hurt by receiving false information about that. The federal government, the local government, to whom the bonds were given didn't receive their claim payments on those bonds.

Q. The claimants were hurt and the regulators were hurt. Who else?

A. ***Also SIG was hurt by doing this. Because the value of those companies as going concerns was destroyed by the removal of the assets.***

* * *

Q. So who else then beside the claimant, possible claimants and the creditors of the surety companies were hurt as a result of monies going up to SIG?

A. ***The shareholders and the debenture holders of SIG.***

Q. ***That's because ultimately the surety company ceased doing business and were taken over by the regulators?***

A. ***That's right. Because the directors had improperly removed their assets.*** . . . And also because the directors of SIG and the insurance companies were the same, removed assets from the insurance companies improperly, that that caused SIG to fail.

* * *

Q. ***And are you saying that you, together with all the other debenture holders and shareholders was hurt because if the money was upstreamed and the surety company didn't have the money to pay its bills, it would go out of business and, therefore, your investment in SIG would be diminished to virtually zero?***

A. ***Yes.***

* * *

Q. ***You are saying that this harm that the shareholders and debenture holders suffered derived from the fact that the surety company was hurt when its coffers, its monies were upstreamed to SIG?***

A. The surety companies, there is three of them.

Q. Yes.

A. ***Yes, because it destroved the going concerns that SIG had to operate.***

(Exhibit R) (emphasis added).

On other occasions Beck testified about Contractors Performance Corporation ("CPC"), a SIG subsidiary that, for a fee, monitored the contractor's performance on construction jobs to prevent a default which would trigger the surety company's bond obligation. Beck alleges that the contractors were extorted, since SIG supposedly conditioned the bond's issuance on the contractor's payment of the CPC fee, which Beck testified was an illegally-disguised insurance premium. It is Beck's belief that because SIG charged these additional fees, it was more willing to issue high-risk bonds to poor-quality contractors. Beck testified that this created a cash-flow mentality at SIG, with SIG issuing high-risk bonds by demanding illegal fees from contractors, thus generating premiums without regard for possible future claims. (Exhibit S). But, most importantly, Beck also testified that the injury from these activities was suffered directly by SIG, its Insurance Subsidiaries and the contractors who paid the monitoring fees:

Q. As a result of that, there were a lot of claims made against the surety companies on account of these bonds issued to contractors who as you said shouldn't have received them, is that correct?

A. Yes.

Q. And it was as a result of the claims that were made that the surety companies found themselves in a very difficult economic position as time went on; is that correct?

A. I think that's one of the reasons why.

Q. I can only deal with one at a time. As a result of these claims, the assets of the

surety companies, their capital was being eroded, correct?

A. Yes.

Q. That's because they had to pay money on this account of bonds issued to contractors whom, as you say, shouldn't have received the bonds, correct?

A. Yes.

Q. So that ultimately as a result of issuing bonds to questionable contractors, poor quality contractors, the capital of the various surety companies was eroded or almost depleted, correct?

A. Is there a point in time?

Q. Eventually. Later on.

A. Yes.

Q. *So that the entity that was hurt in the first instance was the surety companies: is that correct? In the first instance?*

A. *Yes.*

Q. . . . The entity that was directly injured as a result of the slippery slope procedure, as you describe it, was the surety company, correct?

A. Yes.

Q. *But as you say as a result of the direct injury to the surety company, the holding company, SIG, who owned the stock in the surety company, suffered secondarily; is that correct?*

A. *Yes.*

Q. And that's because the value of its investment in the surety company declined or at one point it became almost worthless, correct?

A. Yes, that's part of it.

Q. *And thirdly, the entities, the group that suffered tertiarally* [sic] *were the shareholders and debenture holders of SIG because of their investment in SIG became virtually worthless; is that correct?*

A. *Yes.*

Q. *And you were one of those shareholder debenture holders, correct?*

A. *Yes.*

Q. *So as a result of this slippery slope procedure that you have described in detail, when all the string is running out, you, togther with all the other shareholders lost money, correct? Shareholders and debenture holders lost money, correct?*

A. *Yes.*

(Exhibit T) (emphasis added).

In sum, Beck conceded that he and all the other shareholders and debenture holders lost the value of their investment when, because of the alleged RICO predicate acts targeted at the Insurance Subsidiaries "SIG went out of business." (Exhibit U); *see also* (Exhibit V). Beck has no RICO standing to sue for the indirect losses allegedly sustained by him and SIG's other shareholders and creditors. Thus, Beck's own testimony confirms that he lost the

value of his stock and his unsecured loan (debentures) only because the defendants' alleged RICO predicate acts were targeted at and injured third parties such as the Insurance Subsidiaries, SIG, and contractors, whose injuries derivatively harmed Beck. Thus, Beck cannot establish direct injury, and he does not have RICO standing.

Termination of Beck's Employment

The next category of Beck's alleged damages is the loss of employment. Beck contends that the defendants fraudulently created causes for Beck's termination in order to substantiate a termination for cause and to shift the blame for defendants' allegedly illegal conduct. Beck alleges that this termination was carried out because he refused to participate in these activities and because he posed a threat as a whistleblower. (Exhibit A, Exhibit B, ¶ 2(a)(v).).

Assuming these allegations as true, they still do not give rise to a RICO claim, because all of the predicate acts alleged in Beck's Complaint were directed at and injured third parties. (Exhibit A, ¶¶ 79-128). As set forth in the Memorandum of Law, the Eleventh Circuit law clearly precludes such a claim.

The First Fidelity Guaranty

With respect to the First Fidelity Guaranty, Beck's testimony is equally damaging to his own case. On December 30, 1987, First Fidelity Bank extended SIG a $7.5 million loan and required the senior officers and directors – including Beck and the Bellezza Group – to

sign personal Guaranties. SIG defaulted on the loan, and on November 8, 1989 First Fidelity filed a lawsuit in New Jersey State Superior Court against SIG and the guarantors to recover the $3.3 million outstanding balance. Beck filed a Third-Party Complaint against Lampf, Lipkind, Prupis & Petigrow ("L2P2") for legal malpractice claiming that the law firm misadvised him as to his liability on the Guaranty.[7] (Exhibit W).

On June 29, 1990, the New Jersey Superior Court entered judgment against the Guarantors for the $3.3 million principal. (Exhibit X). The Bellezza Group paid the judgment and took an assignment of the judgment (Exhibit Y), and then they sued L2P2 for legal malpractice arising out of L2P2 advising the directors' to sign the guaranties. The Bellezza Group recovered a substantial sum from L2P2 in a settlement and assigned the First Fidelity judgment to L2P2. (Exhibit Z).

Beck continued to prosecute his Third-Party Complaint against L2P2, however, seeking to recover his attorneys fees incurred in defense of the First Fidelity Guaranty action.[8] Beck and L2P2 settled, with Beck receiving $425,000, which was virtually all of his First Fidelity attorneys fees, and the First Fidelity judgment

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[7] At all relevant times during SIG's existence, L2P2 was SIG's legal counsel, and three of Lampf Lipkind's principals – William Lipkind, Neil Prupis and Richard Petigrow – were SIG officers and directors.

[8] Beck argued in that action that L2P2's malpractice was the sole cause of his execution of the First Fidelity Guaranty. (Exhibit 2). Now, in a convenient flip-flop, he has the audacity to argue here that the cause of his Guaranty was the Bellezza Group's and other defendants' misrepresentations!

against Beck was extinguished without him paying anything towards it. (Exhibit 1). Thus, Beck's suit against L2P2 sought the very same attorneys fees sought here as RICO damages from the Guaranty. Thus, because Beck recovered those fees in the L2P2 settlement, he has sustained no RICO damages. In any event, the law is clear that he cannot recover attorneys fees as part of RICO damages.

In any event, Beck's testimony confirms that he was not deceived by defendants when signing his Guaranty. Beck alleges that he would not have executed the Guaranty had he known of the true nature of transactions involving a contractor called Chief Structures ("Chief"). The Insurance Subsidiaries had issued surety bonds to Chief on projects that Chief was having trouble completing. SIG or the Insurance Subsidiaries loaned money to Chief to help pay its vendors on those bonded jobs. Beck claims these loans should have been treated as claims on the Insurance Subsidiaries' financial statements. He says he was unaware of the loan transactions and had he known of them, he never would have guaranteed the First Fidelity loan. (Exhibit 3).

But Beck's extensive deposition testimony confirms that he had full knowledge of the Chief situation. First, Beck concedes, as he must, that he was SIG's President and was responsible for financial matters, including submitting financial statements to regulators. (Exhibit 4). Second, Beck also stated that he was on the management Claims Committee that assessed surety bond claims and

established "loss reserves" on SIG's books.[9] He testified that he was aware when he signed the Guaranty that approximately $2 million was loaned by SIG to Chief and other contractors. (Exhibit 5). Beck testified that before signing the Guaranty, he was fully aware of the Chief loans, having actually signed checks totalling over $321,000 where Chief was the payee. (Exhibit 6). He thus was forced to concede he was aware ***prior to signing the Guaranty*** that the reason SIG was making advances to Chief was to help Chief complete its construction projects and pay its vendors. (Exhibit 7). Also, Beck admitted that Neil Prupis told him that the Chief advances would continue to be made in the future. (Exhibit 8).

Beck also admitted that, despite being told by Richard Petigrow that the Chief advances were short-term "workout" loans, Beck nonetheless still ***believed*** that they were claims or losses. (Exhibit 9).

Lest there be any doubt, the transactions with Chief were reviewed by Deloitte, Haskins & Sells ("DHS"), SIG's auditors, and properly classified as claims on both the audited financial statements and the statutory financial statements filed with the Florida Department of Insurance. As Mr. Beck testified, he was relying on DHS to properly account for the Chief situation – which they did. (Exhibit 11).

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[9] A "loss reserve" is an expense/liability item on an income statement. When a claim is made on a surety bond, the insurance company establishes a reserve for potential payouts on the bond. (Exhibit 10).

In short, Beck admitted in his deposition that he signed the $7.5 million First Fidelity Guaranty despite having all of this knowledge of the Chief transactions and despite knowing that the advances would continue. (Exhibit 12).

Respectfully submitted,

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DATED: March 29, 1995
1256/YW.MMR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-8121-CIV-ROETTGER

ROBERT A. BECK, II,

Plaintiff,

v.

ROBERT M. PRUPIS, et al.

Defendants.
_____/

MEMORANDUM OF LAW OF [sic] IN SUPPORT OF DEFENDANTS' THE BELLEZZA GROUP'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The importance of resolving this motion prior to trial cannot be understated. The parties have pre-marked approximately 5,000 trial exhibits, have listed more than 30 trial witnesses, and have estimated a 6 to 8 week trial. Thus, before the court's time is wasted, and now that discovery is completed, the threshold issue of standing can be decided as a matter of law. Pure legal standing questions are not jury issues, and this case can now be decided on summary judgment.

Plaintiff alleges that the defendants conducted the affairs of SIG through a pattern of racketeering activity. Plaintiff, a shareholder and creditor of SIG, alleges he lost the value of his stock and was not repaid his indebtedness because defendants' alleged RICO conduct caused the demise of SIG. The law is clear, however, that a shareholder/creditor does not have RICO standing to sue for such derivative losses.

The only plaintiffs having RICO standing in such a situation are the corporation, its shareholders **suing derivatively**, or as here, where the corporation is defunct, its Bankruptcy Trustee. Indeed, the very claims brought by plaintiff here have been the subject of suits brought by SIG's Bankruptcy Trustee and the Receiver appointed by the Florida Department of Insurance. The Trustee's RICO complaint, which made the same allegations as Beck makes here, were dismissed, and the Receiver's suit was settled. Moreover, Mr. Beck already had his day in court, having previously filed a RICO suit in Florida state court making the same RICO allegations as in this suit. That suit was dismissed for lack of standing.

LEGAL ARGUMENT

POINT I

PLAINTIFF BECK DOES NOT HAVE STANDING TO SUE UNDER RICO, BECAUSE HIS INJURIES ARE ENTIRELY DERIVATIVE AND THEREFORE HE CANNOT ESTABLISH PROXIMATE CAUSE

A. Plaintiff Beck Lacks Standing as a Shareholder/Creditor.

The Eleventh Circuit follows a very strict test for determining whether plaintiffs have standing to sue for RICO treble damages, holding that the plaintiff's injury must flow *directly* from the predicate acts complained of and cannot, as claimed by plaintiff here, merely derive from the general demise of the corporation. *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991); *Morast v. Lance*, 807 F.2d 926, 933 (11th Cir. 1987); *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987). Thus, as the United States Supreme Court recently held, where a RICO plaintiff complains of harm flowing merely from the "misfortunes visited upon a third person" (e.g., the demise of a corporation), the plaintiff stands at too remote a distance to recover. *Holmes v. Security Inv. Protection Corp.*, 112 S.Ct. 1311, 1318 (1992).

Dispositive of Beck's stock and debenture claims is the Eleventh Circuit's decision in *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991). Plaintiff in *Pelletier* claimed that he lost the value of his investment in a corporation as a result of RICO predicate acts directed against the corporation that depleted its assets. The Eleventh Circuit affirmed a summary judgment in favor of defendants,

holding that the predicate acts were directed against the corporation and that plaintiff's injury was derivative of the direct harm suffered by the corporation. In so holding, the Eleventh Circuit adhered to the restrictive view that a plaintiff has RICO standing only if his injury flowed directly from the commission of the predicate acts. This means that when the alleged predicate act is mail or wire fraud – as it is in the Beck Complaint – the plaintiff must have been a target of the scheme to defraud and have relied to his detriment on misrepresentations made in furtherance of that scheme. *Pelletier v. Zweifel*, 921 F.2d at 1499; *O'Malley v. O'Neill*, 887 F.2d 1557, 1563 (11th Cir. 1989). The court in *Pelletier* concluded that the predicate acts complained of were practiced upon the corporation and that plaintiff, who lost his investment, had no RICO standing. *Pelletier*, 921 F.2d at 1499, 1506-10.

Pelletier is consistent with the conclusion reached in virtually every other Circuit Court, all of which hold that a shareholder who loses the value of his investment because of RICO predicate acts visited upon the corporation lacks the standing to sue for that loss. *See Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987),[1] and that a bankrupt corporation's creditors do not have RICO standing since their injuries are also derivative. *See, e.g., Manson v. Stacescu*, 11 F.3d 1127, 1130 (2d

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[1] *Accord Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 29 (1st Cir 1987); *Manson v. Stacescu*, 11 F.3d 1127, 1131 (2d Cir. 1993); *Whalen v. Carter*, 954 F.2d 1087, 1091 (5th Cir. 1992); *Warren v. Manufacturers Nat. Bk. of Detroit*, 759 F.2d 542, 544 (6th Cir. 1985); *Flynn v. Merrick*, 881 F.2d 446, 449-50 (7th Cir. 1989); *Brennan v. Chestnut*, 973 F.2d 644, 648 (8th Cir. 1992); *Sparling v. Hoffman Constr. Co*, 864 F.2d 635, 640 (9th Cir. 1988).

Cir. 1993). In shareholder cases it is the corporation (or shareholder suing derivatively) that has RICO standing, while in creditor cases the Bankruptcy Trustee or Insolvency Receiver has standing. *Whalen v. Carter*, 954 F.2d 1087, 1092 (5th Cir. 1992); *Mid-State Fertilizer Co. v. Exchange Nat. Bk.*, 877 F.2d 1333, 1335-36 (7th Cir. 1989); *Wooten v. Loshbough*, 951 F.2d 768, 770 (7th Cir. 1991); *In re Sunrise Securities Lit.*, 916 F.2d 874, 883, 888-89 (3rd Cir. 1990).

Beck's RICO CIS, as well as his deposition testimony, make it quite clear that the RICO predicate acts complained of were practiced upon SIG and its Insurance Subsidiaries – allegedly *directly* causing their demise and only indirectly or derivatively causing Mr. Beck's loss of his investment and $150,0000 indebtedness. Starting at page 13 of his CIS, Beck lists a series of alleged RICO predicates acts, every one of which was directed at SIG and other third parties, which Mr. Beck alleges caused the demise of SIG and its Insurance Subsidiaries. At pages 13 and 14 of his CIS, Beck complains about CPC (a SIG subsidiary), alleging it charged illegal fees to various contractors, including All Bright Electric Company, Shoemaker Plumbing, SCR Drywall, CIPI Corp., Agmilu & Co., Ahmad Construction Co. and others. Beck complains that CPC performed no services for those fees, or that the fees were disguised premiums for which SIG and its Insurance Subsidiaries had not received rate approval from the Florida Department of Insurance. Mr. Beck's testimony confirms that set forth in his RICO CIS, i.e., that the victims of the CPC activity were the *contractors* who paid the alleged improper fees and/or the *Insurance Subsidiaries* who purportedly wrote poor risk bonds for

these contractors. *A fortiori*, and as Mr. Beck was forced to concede, it was the *contractors* who suffered harm when allegedly compelled to pay improper fees, and the *Insurance Subsidiaries* who purportedly wrote poor quality bonds, leading to their demise. As Mr. Beck acknowledged, the loss of his $150,000 indebtedness and the loss of his stock was derivative of the demise of the Insurance Subsidiaries and SIG. *See* Statement of Material Facts at 11-14.

At pages 15 and 16 of his CIS, Beck complains of a transaction between Bellezza, JJW Construction Company (to whom the Insurance Subsidiaries issued bonds) and CPC. Succinctly stated, Beck complains that CPC and/or Bellezza received an $80,000 fee from JJW because either Bellezza or CPC personally issued guarantees to the Insurance Subsidiaries for surety bonds issued to JJW. *Significantly, the Insurance Subsidiaries did not sustain a loss on account of these bonds.* But Beck claims that the fees charged by CPC and/or Bellezza *to JJW* were improper. Assuming this to be so, obviously the entity against whom the harm was targeted was JJW, or, at worst, the Insurance Subsidiaries who Beck claims were put in a position of writing poor quality risks. Beck claims that the JJW transaction contributed to an atmosphere of loose underwriting practices which contributed to SIG's demise, as a result of which he lost his investment and $150,000 indebtedness. *See* Statement of Material Facts at 11-14.

The allegations at pages 17 through 19 of Beck's CIS also complain of excessive spending by SIG, and

particularly, Teresa Waldron and Neil and Ron Prupis.[2] As Beck acknowledged, the alleged excessive spending contributed to the demise of SIG and its subsidiaries – with the resulting loss of Beck's investment and indebtedness.

In paragraph 2(a)(iii) at page 3 of his CIS, Beck complains of the "looting" of SIG. He described the "looting" as the intracompany transfer of funds amongst SIG and its Insurance Subsidiaries. He complains that the Insurance Subsidiaries transferred or loaned monies to SIG to enable it to pay legitimate loans due to First Fidelity and SIG bond holders. He also complained that the loans from the Insurance Subsidiaries to SIG enabled it to repay $2 million of indebtedness SIG owed to Pension Plans in which defendants Bellezza and Olstein were pension trustees. These Pension Plans loaned SIG $2 million for the use by the Insurance Subsidiaries. Mr. Beck contends that the intracompany transfer of funds by the Insurance Subsidiaries to SIG to repay these legitimate debts denuded the Insurance Subsidiaries of monies to pay other creditors or bond obligees.

While Mr. Beck can cite no criminal statute purportedly violated by the intracompany transfers, nevertheless, the parties injured by virtue of those transfers were the Insurance Subsidiaries. Mr. Beck conceded at his

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[2] At page 18, Beck complains that, "In 1987 and until May of 1988, unnecessary limousine reservations were made via telephone calls from Florida for SIG personal traveling to New Jersey. Teresa Waldron, acting [sic] the direction of N. Prupis and R. Prupis, made at least one of these reservations with Livingston Five Star Limousine."

deposition that by transferring the monies to SIG, those Insurance Subsidiaries were deprived of needed funds – supposedly leading to their demise. Beck acknowledged that the loss of his investment in SIG as well as his $150,000 indebtedness derived from the demise of SIG and its Insurance Subsidiaries. *See* Statement of Material Facts at 9-11. Thus, even if the intracompany transfers were RICO predicate acts (which they are not), then the targeted victims were SIG and its Insurance Subsidiaries whose assets were allegedly "looted," and Mr. Beck's harm merely derived from their demise. And, indeed, SIG's Bankruptcy Trustee and the Insurance Subsidiaries' Receiver previously filed suits alleging the very same "looting" and mismanagement that Beck claims here. The Receiver's claims were settled by the defendants, with the settlement proceeds being held for the benefit of SIG's creditors, shareholders, and bond holders, of which Mr. Beck is one.

These allegations having already been the subject of suits brought by SIG's Bankruptcy Trustee and the Insurance Subsidiaries' Receiver, Beck cannot be singled out as having RICO standing for those same claims. This result is consistent not only with the United States Supreme Court holding in *Holmes*, 112 S. Ct. at 1321 (indirectly injured creditor does not have RICO standing, since suit could be an attempt to circumvent the relative priority its claim would have in directly injured corporation's liquidation proceedings), but also with virtually every other Circuit court which holds that individual shareholders/creditors lack standing for such claims. *See Mid-State Fertilizer*, 877 F.2d 1336 (7th Cir. 1989); *Manson v.*

Stacescu, 11 F.3d 1127, 1132 (2d Cir. 1993); *Rand v. Anaconda-Ericsson*, 794 F.2d 843, 849 (2d Cir. 1986). To permit Beck to recover for the injuries that were the subject of the Florida Receiver's suit for which Defendants made a substantial payment, and for which Mr. Beck is a potential beneficiary, would amount to "double counting" of damages. *Mid-State Fertilizer*, 877 F.2d at 1335-36.

Any claim by Mr. Beck that he suffered harm different than that sustained by the general populace of the shareholders and creditors of SIG and Insurance Subsidiaries would be disingenuous. Mr. Beck, like the other SIG shareholders, lost the value of his investment. SIG's Bankruptcy Trustee brought the same RICO claims on behalf of all SIG shareholders as Mr. Beck brings here. It was the Bankruptcy Trustee who had the standing since he stands in the shoes of the victim of the alleged RICO predicate acts, i.e., SIG. Mr. Beck has no individual standing for these claims. In instances where individual RICO claims are asserted, the courts will look at state law to determine whether the alleged injury is derivative or direct. *See e.g., Crocker v. FDIC*, 826 F.2d 347, 349 (5th Cir. 1987); *Flynn v. Merrick*, 881 F.2d 446, 449 (7th Cir. 1989). If the damages are derivative, the case must be dismissed. Florida law is quite clear that where acts of corporate directors cause the company's demise, rendering a plaintiff's investment worthless, an individual shareholder lacks standing. The claim can only be brought derivatively by the corporation or its bankruptcy trustee (or in this instance its Insurance Receiver). *See Alario v. Miller*, 354 So.2d 925, 926 (Fla. App. 1978).

Beck may attempt to argue that he was fraudulently induced to purchase the stock/debenture units in August

1986. In deposition, he testified that he was induced to buy the units by defendants' representations in the Private Placement Memorandum that he was SIG's CEO and that SIG's business focus was reinsurance; whereas after the private offering Ronald Prupis replaced him as CEO and changed the focus to direct writing of surety bonds. (Exhibit 13). These assertions are without merit, both legally and procedurally. Firstly, any new claim that he was misled by the Private Placement Memorandum is time-barred. The statute of limitations for such claims is one year from the date of discovery of the alleged fraud. 15 U.S.C. § 77m. Mr. Beck knew he was not CEO when, in July 1986, before he purchased his shares and $150,000 debentures, he signed an employment contract which gave him the title of President, not CEO. Moreover, he knew within seven days of the Offering that Ron Prupis was replacing him as CEO. *See* Exhibit 14, Vol. V, 58-60. It is simply too late now to concoct any new claims, as the District Court of New Jersey held in 1990 when it *dismissed* the shareholders' securities and RICO claims on statute of limitations grounds. *See* Exhibit K at 28-49, 54-62.

Moreover, as a procedural matter, neither Beck's Complaint nor his CIS alleged that he was fraudulently induced by the Private Placement Memorandum. He alleges only that he was fraudulently induced by a promise of continued employment *as President* (not as CEO), but that defendants had supposedly already hatched a scheme to terminate him. Exhibit B, ¶2(a)(vii); Exhibit A, ¶¶43-60. The Bellezza Group relied upon the Complaint and CIS in conducting discovery. Therefore, Beck should not be permitted, in a desperate effort to manufacture

RICO standing, to expand upon the allegations contained in his Complaint and CIS.

In sum, Beck does not have standing to sue for the lost value of his stock or for the debentures. *See National Enterprise v. Mellon Fin. Services*, 847 F.2d 254 (5th Cir. 1988) (creditor did not have RICO standing since inability to collect debt was caused by corporation's bankruptcy, not by predicate acts that depleted corporate assets); *Manson v. Stacescu*, 11 F.3d at 1130 (2d Cir. 1993) (obligors on $450,000 corporate loan did not have RICO standing); *Whalen v. Carter*, 954 F.2d at 1092-94 (debenture holders had no RICO standing where fraud devalued the corporation generally); *Mid-State Fertilizer*, 877 F.2d at 1335-36 (guarantors of bankrupt corporation did not have RICO standing); *Crocker v. FDIC*, 826 F.2d 347, 350 (5th Cir. 1987) (shareholders did not have RICO standing where diminution in stock value occurred because of mismanagement); *Leach v. FDIC*, 860 F.2d 1266, 1273-74 (5th Cir. 1988) (same).

B. Plaintiff Beck Lacks Standing Regarding the Guaranty.

Beck also lacks RICO standing to sue for damages resulting from his execution of the $7.5 million First Fidelity Guaranty because he sustained no injury to "business or property" within the purview of 18 U.S.C. § 1964(c).

Assuming *arguendo* that Beck can show that he was fraudulently induced to sign the Guaranty, it is undisputed that he suffered no damages. As set forth in the

Statement of Material Facts, Beck never paid anything to First Fidelity on account of his Guaranty. Moreover, he recovered $425,000 of legal fees he expended in defending the First Fidelity lawsuit brought against him on the Guaranty. He recovered that sum in a lawsuit he brought against L2P2, claiming their negligence led him to sign the guaranty. These are the same legal fees he claims as RICO damages here. Therefore, Beck has not sustained any injury to "business or property" by reason of the supposed RICO violation. *Taffet v. Southern Co.*, 967 F.2d 1483, 1487-88 (11th Cir. 1992); *E.T. Barwick Indus. v. Walter E. Heller & Co.*, 692 F. Supp. 1331, 1352-53 (N.D. Ga. 1987), *aff'd*, 891 F.2d 906 (11th Cir. 1989); *see also Arabian Amer. Oil Co. v. Scarfone*, 713 F. Supp. 1420, 1423 (M.D. Fla. 1989) (plaintiff suffered no RICO damages where he was fully reimbursed by third party); *Commercial Union Assur. Co. v. Milken*, 17 F.3d 608, 612 (2d Cir. 1994) (plaintiffs could not maintain RICO action where they received full amount of damages in settlement).

Even if Beck now claims that his legal fees in defending the First Fidelity suit exceeded the $425,000 recovered from L2P2, those attorneys' fees simply are not a compensable element of RICO damages. The law in this District is clear that legal fees incurred to prosecute or defend a claim cannot be an element of RICO damages. *Local 355 v. Pier 66 Co.*, 599 F. Supp. 761, 765 (S.D. Fla. 1984); *accord Doe v. Roe*, 756 F. Supp. 353, 360 n.11 (N.D. Ill. 1991); *Capasso v. Cigna Ins. Co.*, 765 F. Supp. 839, 842 (S.D.N.Y. 1991). In *Local 355*, plaintiff sought as RICO damages the legal fees it was forced to expend in a National Labor Relations Board proceeding occasioned by defendant's improper decertification of the plaintiff's labor union. In

granting summary judgment to defendant, the District Court held that legal fees were not compensable RICO damages. For that reason alone, Beck's claim for legal fees resulting from the First Fidelity transaction over and above the $425,000 he already recovered must be dismissed.

If that was not enough, the alleged acts of wire and mail fraud connected to the First Fidelity Guaranty do not give rise to any claim against the Bellezza Group. In his Complaint, Beck makes reference to three alleged acts of wire fraud, three telephone calls made in December 1987. (Exhibit A, ¶¶ 108, 109, 111). These alleged predicate acts, however, cannot give rise to liability on the part of the Bellezza Group, since none of the phone calls involved Messrs. Bellezza, Olstein, Paulus or Sabato.[3] The phone calls referenced in Paragraphs 108 and 109 – where plaintiff alleges Neil Prupis and Lynn Day (SIG's treasurer) had conversations about allegedly false financial estimates – are unavailing for another reason: Beck was not the target of the alleged fraud. Beck testified that Neil Prupis gave Day false financial information and asked him to prepare a projection of SIG's future financial performance from 1987 through 1991, and that this projection was given to and relied upon ***by First Fidelity*** in extending SIG the $7.5 million loan. Beck himself never received these projections before signing the Guaranty. (Exhibit 15).

---

[3] Beck testified that he does not know anything about the phone call referenced in Paragraph 111 (**Beck Dep. Vol. 9, p. 146**). Therefore, he cannot rely on Paragraph 111.

However, "when the alleged predicate act is mail or wire fraud, the ***plaintiff must have been a target of the scheme to defraud*** and must have relied to his detriment on misrepresentations made in furtherance of that scheme." *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991) (emphasis added). Here, Beck merely contends that ***First Fidelity*** was the target of that scheme to defraud and that ***First Fidelity*** relied upon the financial projection in issuing the loan. Beck merely alleges that he was injured as a secondary consequence of SIG failing to repay the loan. (Exhibit 16). Thus, again, Beck has failed to prove that he was injured "by reason of" any predicate acts. *O'Malley v. O'Neill*, 887 F.2d 1557, 1563 (11th Cir. 1989) (terminated whistleblower lacked RICO standing where target of mail fraud scheme was government and other third parties); *Kingston Square Tenants Ass'n v. Tuskegee Gardens*, 792 F. Supp. 1566, 1578 (S.D. Fla. 1992) (public housing tenants lacked RICO standing where target of fraud was HUD); *see also Mandelovitz v. Vosicky*, 40 F.3d 182, 186-87 (7th Cir. 1994).

Beck also alleges that he would not have signed the Guaranty had he known of the Chief Structures loan situation. But as Beck conceded in his depositions, he had full knowledge that loans were being made to Chief to assist it in completing construction projects and that such advances would continue in the future. He signed checks for loans totalling $321,000 for the benefit of Chief. He knew that over $2 million was owed by Chief to SIG or its Insurance Subsidiaries. He also knew that the repayment of those loans were questionable and that they might turn into claims. He nevertheless signed the Guaranty (against which he has never paid a penny). *See* Statement of

Material Facts at 15-18. Beck can hardly argue, with a straight face, that he did not know of the Chief Structure situation or its potential impact when he signed the Guaranty.

Therefore, as a matter of law, Beck did not rely on any representations regarding Chief, and his lack of reliance is another independent reason why his Guaranty claim must be dismissed. The plaintiff's lack of reliance was the very reason the Eleventh Circuit granted summary judgment to the defendants in *Pelletier v. Zweifel*, 921 F.2d at 1506-10. *Accord Blount Fin. Servs. v. Walter E. Heller & Co.*, 819 F.2d 151, 153 (6th Cir. 1987); *Grantham & Mann, Inc., v. American Safety Prods., Inc.*, 831 F.2d 596, 606 (6th Cir. 1987); *Mid-State Fertilizer v. Exchange Nat. Bk.*, 877 F.2d 1333, 1337 (7th Cir. 1989 [sic]; *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1312 (2d Cir. 1990); *Ferndale Corp. v. Schulman Urban Dev. Assocs.*, 758 F. Supp. 861, 866 (S.D.N.Y. 1990); *North Amer. Fin. Group v. S.M.R. Enter., Inc.*, 583 F. Supp. 691, 698 (N.D. Ill. 1984); *Puller Mortgage Assocs. v. Keegan*, 829 F. Supp. 1507, 1521-23 (S.D. Ind. 1993); *Langley v. American Bk. of Wisconsin*, 738 F. Supp. 1232, 1235 (E.D. Wis. 1990).

C. Plaintiff Beck Lacks Standing as a Whistleblower.

Plaintiff Beck alleges that defendants hatched a scheme in 1986 to create fraudulent causes for a termination that occurred *in 1988*, to brand him as a scapegoat for their alleged illegal activities, and to prevent him from blowing the whistle on their alleged illegal activities. (Exhibit A, ¶¶ 43-60; Exhibit B, ¶ 4(a)(i).). Even if these

allegations are true, however, Beck does not have RICO standing.

It is well established in the Eleventh Circuit that employees who were terminated for either refusing to participate in an illegal RICO scheme, or for reporting or threatening to report defendants' alleged racketeering to the relevant authorities, *do not* have standing to sue under RICO for damages flowing from their discharge. The court reasons that the injury was not caused by the predicate acts and thus does not satisfy Section 1964(c)'s causation requirement. *O'Malley v. O'Neill*, 887 F.2d 1557, 1561 (11th Cir. 1989); *Morast v. Lance*, 807 F.2d 926, 933 (11th Cir. 1987); *Schenk v. Southeast Banking Corp.*, 725 F. Supp. 1231 (S.D.Fla. 1989). Furthermore, this predicate act requirement applies in Section 1962(d) conspiracy claims as well as Section 1962(c) substantive claims. *Morast*, 807 F.2d at 933; *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir. 1993)

What makes Beck's RICO claim for whistleblower damages even more egregious is the fact that he previously filed an identical RICO complaint against these very same defendants in the Florida state court which dismissed for lack of standing. How many times do these defendants have to defend against the same claims?

POINT II

PLAINTIFF BECK'S ENTIRE COMPLAINT MUST BE DISMISSED BASED ON THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL.

Robert A. Beck II has made it his life's sole purpose to file lawsuits against the former officers and directors of

SIG. He has testified that he spends the equivalent of a full-time job – five or six days a week, eight hours a day – working on the numerous lawsuits he has brought against these defendants. (Exhibit 17). He has filed suit in three different forums in an effort to find the right law and judge to adjudicate his treble damage claims. This is exactly the type of forum-shopping and waste of judicial resources that the doctrines of *res judicata* and collateral estoppel seeks to prevent.

Under 28 U.S.C. § 1738, a federal court must give a state judgment the same preclusive effect that the state court would give it. *Marese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373 (1985); *Stockton v. Lansiquot,* 838 F.2d 1545 (11th Cir.), *cert. denied,* 488 U.S. 891 (1988). Florida state law recognizes that *res judicata* puts at rest every justiciable, as well as every actually adjudicated, issue once there has been a judgment on the merits. *Gordon v. Gordon,* 59 So.2d 40, 43 (Fla. 1952).

Collateral estoppel or issue preclusion bars relitigation of matters that were actually litigated and decided in a prior suit. *Res judicata* or claim preclusion bars litigation of matters that could have been litigated in a prior suit, but were not. *Pelletier v. Sweifel,* 921 F.2d 1465, 1501 (11th Cir. 1991), *citing Migra v. Warren City School Dist.,* 465 U.S. 75, 77 n.1 (1984). Here, Beck's substantive whistleblower RICO claims that were dismissed in the Florida action are barred by collateral estoppel, since they were actually litigated and decided. (Exhibit H).

Moreover, any other claims that could have been asserted in the Florida state case – including RICO conspiracy claims and common law claims – are barred by *res*

judicata. The Eleventh Circuit has held that if a case arises out of "same nucleus of operative fact" or the same "series of transactions" as a previous lawsuit, then the two cases are the same "claim" for purposes of *res judicata. Pelletier,* 921 F.2d at 1502; *Wallis v. Justice Oaks II, Ltd.,* 898 F.2d 1544, 1551 (11th Cir.), *cert. denied,* 111 S.Ct. 387 (1990). Here, there can be no doubt that Beck's Florida complaint and the instant federal complaint arise out of the same "nucleus" of facts. In fact, the complaints are fairly identical.

For instance, in both actions Beck alleged that the Bellezza Group, along with the other defendants, fraudulently created causes for terminating his employment because of his refusal to participate in the alleged illegal activity and because he posed a threat as a whistleblower. In both suits Beck alleged that he was fraudulently induced to guarantee a $7.5 million loan to First Fidelity. The alleged illegal activities in which Beck refused to participate are also the same in both complaints, such as alleged extortion of contractors who were forced to pay fees to CPC, abuses by the compensation committee in permitting payment of inflated salaries and benefits to cronies and family members, and payment of excessive travel and entertainment expenses for SIG officers and directors and their spouses. Thus, it is clear that the allegations in both actions are practically identical and against the same parties.

Finally, to the extent certain of Beck's damage claims – such as the loss of value of stock and the unsecured debenture loan – were not specifically pleaded in the Florida action, they are still barred because the factual predicate for such claims existed when the Florida action

was still pending, and perhaps even before Beck filed it. The Florida Receiver took over SCI-Fla and SRC in August 1989 for the purpose of liquidation, so Beck could have asserted shareholder/creditor claims at that time. In any event, Beck testified that the value of his stock and debentures was decreasing ***while SIG was still a going concern***, as its earnings were decreasing. (Exhibit 18). Thus, Beck's stock/debenture claims ripened in 1987 and 1988, well before he even filed the Florida Complaint. Therefore, Beck's instant claims are barred by *res judicata*. *Pelletier*, 921 F.2d at 1500-02 (granting summary judgment dismissing plaintiff's RICO Complaint on res judicata).

Moreover, Beck could have raised his federal RICO claims in Florida state court and did not. *Tafflin v. Levitt*, 493 U.S. 455 (1990). Having opted to forego his federal RICO claims in his state court action, he cannot now raise those claims which should have been brought in state court. *Martell v. Martell*, 887 F.2d 1322, 1326 (7th Cir. 1989); *Carman v. First Nat. Bank of Louisville*, 642 F. Supp. 862, 864 (W.D. Ky. 1986).

Therefore, Beck's entire Complaint is barred by the doctrines of *res judicata* and collateral estoppel.

POINT III

BECK'S COMMON LAW CLAIMS MUST ALSO BE DISMISSED

Counts V through X of Beck's Complaint allege common law fraud and negligence regarding the same damages alleged in the RICO counts. These common law claims should be dismissed for the same reasons Beck lacks standing under RICO. Moreover, if the RICO claims

are dismissed, the Court will lack subject matter jurisdiction over the common law claims and should decline to exercise supplemental jurisdiction over those claims. 28 U.S.C. § 1367(c)(3).

CONCLUSION

For the foregoing reasons, Summary Judgment should be entered in favor of the Bellezza Group, and Plaintiff Robert A. Beck II's Complaint should be dismissed with prejudice.

Respectfully submitted,

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1089/U9.RMD

Due to their volume, the Exhibits to the Memorandum of Law in Support of Defendants' the Bellezza Group's Motion for Summary Judgment, which are part of the record below (R 137), are not duplicated in this Joint Appendix

(6)

No. 98-1480

Supreme Court, U.S.
FILED
JUL 22 1999
CLERK

In The

Supreme Court of the United States

ROBERT A. BECK, II,

Petitioner,

vs.

RONALD M. PRUPIS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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VOLUME II, PAGES 234 TO 468

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 91-8121-CIV-ROETTGER

ROBERT A. BECK, II

Plaintiff,

vs.

RONALD M. PRUPIS, et al.,

Defendants.

_____/

PLAINTIFF ROBERT A. BECK, II'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS A GENUINE ISSUE TO BE TRIED, IN OPPOSITION TO THE NEW JERSEY GROUP'S MOTION FOR SUMMARY JUDGMENT

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SUMMARY

In its Statement of Material Facts, the New Jersey Group,[1] selectively quotes and distorts various facts, in an attempt to make a massive RICO conspiracy look like an innocent corporate affair. The New Jersey Group's effort, however, is nothing more than a repeat of the legal arguments previously raised in its unsuccessful Motion to Dismiss. As there is substantial evidence supporting all of plaintiff Robert A. Beck, II's ("Beck") allegations, at minimum, genuine issues of material fact remain.

Amazingly, in once again arguing that Beck lacks standing to assert his claims, the New Jersey Group's Statement of Material Facts ignores the substantial evidence of the predicate acts committed directly against Beck. For example, Beck asserts as predicate acts that he was fraudulently induced by the New Jersey Group and others to extend an unsecured loan to the New Jersey Group's enterprise, to purchase stock in the New Jersey Group's enterprise and to refrain from selling it, and to personally guaranty a $7.5 million loan to that enterprise. The damages that Beck suffered by reason of these predicate acts are classic RICO damages for which he has standing.

THE ALLEGATIONS

This is an action by Beck under "RICO," 18 U.S.C. § 1961 *et seq.*, for a pattern of racketeering activity committed by the defendants, former officers and directors of

[1] The New Jersey Group refers to defendants Leonard Bellezza, William Paulus, Jr., Ernest Sabato and Harry Olstein.

Southeastern Insurance Group, Inc. ("SIG" or the "Enterprise"), by reason of which Beck has directly suffered damages.

Beginning in or around the fall of 1985, the defendants devised a scheme and artifice to defraud Beck and others and, in addition, used their positions at SIG to extort potential customers. Complaint at ¶¶11-13 (Exhibit 1); Beck's RICO Case Statement at 1 (Exhibit 2). As part of this scheme and artifice to defraud, the defendants fraudulently induced Beck to make an unsecured loan to the Enterprise, to purchase stock and invest in the Enterprise and refrain from selling that stock until it was too late, and to be a personal guarantor on a $7.5 million loan to the Enterprise. Complaint at ¶¶14-15, 61-78; RICO Case Statement at 5, 11-12. Moreover, when Beck became a threat to the continued racketeering conduct of the defendants, the defendants fraudulently created causes for Beck's termination. Complaint at ¶¶12-13 and 43-60; RICO Case Statement at 3.

The defendants' racketeering activity included mail and wire fraud and extortion, within the context of the following:

(a) Falsifying financial statements (Complaint at ¶¶18-19 and 22; RICO Case Statement at 2, 5);

(b) Looting the Enterprise (Complaint at ¶¶20-21, 33-35 and 37-41; RICO Case Statement at 3);

(c) Extorting contractors (Complaint at ¶¶23-30; RICO Case Statement at 2);

(d) Set aside fraud (Complaint at ¶31; RICO Case Statement at 5-6);

(e) Fraudulent promises to indemnify (Complaint at ¶32; RICO Case Statement at 6); and

(f) Attempted options fraud (Complaint at ¶36; RICO Case Statement at 3).

Approximately 50 predicate acts are set forth in detail in the Complaint in order to fulfill RICO's pattern requirement.

PROCEDURAL HISTORY

Beck initially filed a state court complaint in Florida Circuit Court, alleging a wrongful termination claim against SIG, defamation, and state RICO claims against the New Jersey Group and others based *solely* upon Beck's status as a terminated whistleblower. *See* Beck's Florida Circuit Court Complaint (Exhibit 3). The New Jersey Group filed a motion to dismiss Beck's claims, arguing that Beck did not have standing. Based on *Shearin v. E.F. Hutton*, 885 F.2d 1162 (3d Cir. 1989), the Florida Circuit Court granted the motion as to the substantive RICO claims, but denied it as to the RICO conspiracy claims.[2] Beck's state RICO claims were based solely upon

[2] Truly shocking is the New Jersey Group's reference to the Florida trial court's award of attorneys' fees against Beck. The Third District Court of Appeal reprimanded counsel for the New Jersey Group for even making the motion for fees, and, in its opinion reversing the trial court, the Third District Court of Appeal held that Beck had substantial basis for his action. *See Beck v. Olstein*, 588 So.2d 317, 318 (Fla. 3d DCA 1991).

Beck's standing as a whistleblower, as that was the only claim in existence at the time.

In or about early 1990, SIG was placed into bankruptcy as a result of the defendants' racketeering conduct. At approximately the same time, the shareholders of SIG filed a derivative suit in New Jersey District Court, copying virtually all of the allegations of racketeering conduct directly from Beck's Complaint. The shareholders named the same defendants as Beck's Florida Circuit Court action, with one addition – they also named Beck as a defendant. Beck unsuccessfully attempted to move that claim to Florida. Subsequently, as Beck did not want to litigate the identical complex RICO issues in two separate forums, he voluntarily dismissed his RICO claim in Florida Circuit Court and re-alleged it as a Crossclaim in New Jersey. There was no forum shopping involved (as the same substantive law was applicable wherever the action was pending).[3] In addition, the basis for *new* RICO substantive claims had ripened.

Subsequently, the New Jersey District Court severed Beck's Crossclaim and transferred it to this Court. Since that time, counsel for the shareholder plaintiffs in New Jersey were disqualified and, without counsel, that claim

[3] Contrary to the allegation of the New Jersey Group in its Statement of Material Facts at 4, the Eleventh Circuit has never held that discharged employees who were threatening to blow the whistle did not have standing to sue for RICO damages. *See* Beck's Memorandum of Law in Opposition to the New Jersey Group's Motion to Dismiss (copy attached as Exhibit 7); Beck's Memorandum of Law in Opposition to the New Jersey Group's Motion for Summary Judgment.

was voluntarily dismissed. This was the only reason for the dismissal of the shareholders' suit.

In August of 1989, the Florida Department of Insurance ("FL-DOI") filed three actions against the New Jersey Group and others for various acts, including civil theft (the FL-DOI's Complaints are attached as Exhibits 4, 5 and 6). These actions were settled by the New Jersey Group, but the Settlement Agreement has been withheld from Beck in this action.[4]

In the New Jersey Group's Statement of Material Facts at 7, a chart is attached, which purportedly demonstrates the similarities between several of the previously filed suits and the instant suit by Beck. Of course, some of the predicate acts pled by Beck in the instant case were the subject of other lawsuits. Beck does *not* seek any damages resulting from *those* predicate acts. They are pled in the instant case merely to satisfy RICO's pattern requirements. Cleverly omitted from the New Jersey Group's chart, however, are the predicate acts by which Beck directly suffered injury and for which Beck has standing to sue – namely, the defendants' fraudulent inducement of Beck to extend and guaranty loans to their Enterprise, the defendants' fraudulent inducement of Beck to purchase stock in their Enterprise and refrain from selling it, and the defendants' fraudulent creation of causes to terminate Beck. None of the actions brought by any other party sought damages for these injuries, nor

[4] The Settlement Agreement and the sworn statements executed in connection with those statements are the subject of a pending Motion to Compel.

could they, for they are particular to Beck. These injuries form the heart of the instant case.

In the instant action, the New Jersey Group filed a Motion to Dismiss, which raised the identical arguments that are raised in the present Motion for Summary Judgment. After consideration of Beck's Memorandum in Opposition to this Motion to Dismiss (Exhibit 7), this Court denied the Motion. *See* Order denying New Jersey Group's Motion to Dismiss (Exhibit 8).

I. EVIDENCE OF THE PREDICATE ACTS COMMITTED DIRECTLY AGAINST BECK.

In its Statement of Facts at 8, the New Jersey Group mischaracterizes Beck's action as being for the loss of certain investments and loans. On the contrary, at the heart of Beck's action are the predicate acts that were committed directly against him, by which he directly suffered damages. Specifically, these are as follows:

1. The defendants' fraudulent inducement of Beck to extend a $150,000 loan to the defendants' Enterprise;

2. The defendants' fraudulent inducement of Beck to personally guaranty a $7.5 million loan to the defendants' Enterprise;

3. The defendants' fraudulent inducement of Beck to purchase stock in the defendants' Enterprise and fraudulently causing him to fail to sell his stock until it was too late; and

4. The defendants' fraudulent creation of causes for Beck's termination due to his threat to their continued racketeering conduct.

These are the predicate acts by which Beck was directly damaged and for which Beck is suing the defendants, including the New Jersey Group. There is substantial evidence supporting each of these predicate acts. By selectively citing to sections of the cross-examination of Beck's deposition dealing with the demise of SIG, rather than the fraudulent inducement of Beck, however, the New Jersey Group attempts to mislead the Court into believing that this evidence does not exist. For example, the New Jersey Group ignores the following testimony from Beck:

> Q. Were you hurt because you lost the value of your investment in SIG? Is that how you were hurt as a result of what you are telling us?
>
> A. I was hurt because information was withheld from me and had I had that information I could have prevented losses to myself and to others. I could have prevented the loss on signing the First Fidelity guarantee. I could have prevented the loss that I suffered due to the loss of my employment. I could have prevented the loss and the value of the stock. I could have prevented the loss that came about from the unsecured loan.
>
> I could have prevented all the damages had all these things that have been withheld from me not been withheld from me.

February 7, 1995 Deposition of Beck at 33-34 (Exhibit 9). *See also* January 5, 1995 Deposition of Beck at 72-73 ("This was vital information which was withheld from me") (Exhibit 10).

A. <u>The Defendants' Fraudulent Inducement Of Beck To Extend A $150,000 Loan To The Defendants' Enterprise.</u>

The first RICO predicate act committed by the defendants directly against Beck occurred in 1986, when the defendants fraudulently induced Beck to extend a $150,000 loan to their Enterprise and also to purchase some stock therein. This fraudulent inducement was in connection with a private offering that commenced in the Spring of 1986. At that time, Beck was told both orally and in writing, through the mails, that he would continue to be the Chief Executive Officer of SIG after the offering and, as such, be in charge of the company. These representations were even included in the Private Placement Memorandum at 42 (Exhibit 11).

Believing these representations, Beck extended a $150,000 unsecured loan to SIG and invested an additional $75,000 (to purchase SIG stock). February 6, 1995 Deposition of Beck at 113 (Exhibit 12). If not for his reasonable belief that he would continue to be the Chief Executive Officer of the company, Beck would never have invested. January 6, 1995 Deposition of Beck at 63-64 (Exhibit 13).

Unbeknownst to Beck, the defendants had already decided that Beck would not continue as the Chief Executive Officer of SIG. *See, e.g.*, Deposition of Waldron at 58-59 (Exhibit 14) (she knew from another defendant that Beck would not continue as Chief Executive Officer of SIG after the offering). The statements made to Beck by the defendants were, thus, knowingly false and fraudulent.

The Private offering closed on August 11, 1986. A meeting was held on August 18, 1986, exactly one week after the close of the offering. Deposition of Waldron at 16, 49-50. At this meeting, the defendants officially decided that Beck would no longer continue as the Chief Executive Officer of SIG. Deposition of Westling at 174-76 (Exhibit 15); Deposition of Bailey at 24-25 (Exhibit 16); Deposition of L. Burton at 148-50 (Exhibit 17).

In addition, the defendants fraudulently hid from Beck some of the illegal manner in which they were already operating their Enterprise. Specifically, the New Jersey Group and other defendants fraudulently hid from Beck fraudulent representations they had made to indemnify contractors in order to enable these contractors in which they had an interest to get bonds. *See* Section II(D), *infra*. Had Beck known of these fraudulent promises to indemnify, he would not have extended the $150,000 loan nor invested the additional $75,000 in SIG. February 7, 1995 Deposition of Beck at 31-34 (Exhibit 9).

B. The Defendants' Fraudulent Inducement Of Beck To Personally Guaranty A $7.5 Million Loan.

As to Beck's personal guaranty of the $7.5 million loan, Beck's RICO Case Statement at 3-4 provides the following:

> *Fraudulent Inducement To Execute Personal Guaranty:* In or around November and December of 1987, [the] defendants conspired to and did fraudulently induce Beck to personally guaranty a $7.5 million loan from First Fidelity

> Bank to SIG. The loan was needed by the defendants to continue their racketeering conduct. . . .
>
> To further fraudulently induce Beck to enter into this personal guarantee, [the] defendants conspired to and did employ false and misleading statements and omissions to cause Beck to believe that his employment contract would continue to be honored. However, the defendants had no intention of honoring Beck's contract, as they had already embarked on their criminal conduct and their associated scheme of creating fraudulent causes for Beck's termination and creating a scapegoat for their illegal conduct.
>
> To further fraudulently induce Beck to enter into this personal guaranty, [the] defendants conspired to and did utilize fraudulent financial information to cause Beck to believe that SIG was in a much better financial position than it actually was. Had Beck known: (1) the true financial condition of SIG, (2) the illegal activities committed by the defendants, or (3) the plans to terminate him and use him as a scapegoat, he would not have executed the personal guaranty.

There is substantial evidence supporting all of these points, all of which is ignored by the New Jersey Group.[5]

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[5] Contrary to the New Jersey Group's bald assertion in its Statement of Facts at 15, Beck never claimed that Lampf Lipkind's malpractice was the *sole* cause of Beck's execution of the guaranty. Beck was forced to pursue that action to mitigate his RICO damages suffered as a result of the New Jersey Group's conduct. The applicable standard in the action against Lampf Lipkind was that the malpractice was a substantial contributing cause. In fact, at all times, Beck continued to

1. The fraudulent financial information.

As part of their racketeering conduct, the New Jersey Group, together with others, falsified SIG records and financial statements, resulting in a material overstatement of the value and net income of SIG and its subsidiaries. As the New Jersey Group intended, Beck relied on the fraudulently created financial statements and estimates in his assessment of the likelihood that SIG would be able to repay the First Fidelity loan. As such, Beck was fraudulently induced to guaranty the loan.

Specifically, the New Jersey Group and others caused SIG to treat claims made by Chief Structures, Inc. ("Chief") as a "workout," where claims payments made by SIG (an expense) were fraudulently portrayed as "notes receivable" (an asset). Loss reserves for future claims payments were neither established nor reported. *See* Deposition of L. Burton, pp. 76-80 and 215-18 (Exhibit 17). This resulted in the fraudulent overstatement of the financial condition of SIG by millions of dollars.

The evidence of the Chief saga is substantial. In the Summer of 1987, SIG was notified by Chief's owner, Steve West ("West"), that Chief would be unable to meet its obligations under construction contracts for which SIG's subsidiary ("SCI") had provided bonds. *See* Verified Complaint, *SCI v. Chief, et al.*, Case Number 88-7376, Palm Beach County, Florida, ¶¶ 6-8 (Exhibit 19). This created a

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maintain that other fraudulent conduct, specifically by the New Jersey Group as detailed herein, was a concurrent proximate cause of Beck's damages, the majority of which are still outstanding. *See* March 28, 1991 Affidavit of Beck (Exhibit 18).

claim against the bonds which had been previously issued by SCI.[6] *Id.* Chief requested that SIG provide funds to keep the projects from going into default. *Id.*

Thereafter, West requested additional bonds. Affidavit of R. Prupis at 4 (Exhibit 20). SCI's underwriter determined that Chief would need to post collateral or produce an additional indemnitor to qualify for the new bonds. *Id.* To accomplish this, Bellezza agreed to sign a general indemnity agreement to enable new bonds to be issued to Chief by SCI. Deposition of Kryszak at pp. 91-92 (Exhibit 21); Affidavit of R. Prupis at 5. Because the profit participation fees could not be paid to Bellezza directly without violating insurance laws, Construction Performance Corporation ("CPC"), a SIG affiliate, was used as a front. Deposition of Day at 100-18 (Exhibit 23). Bellezza never executed this general indemnity agreement. Affidavit of R. Prupis at 5.

Bellezza, Paulus and others drafted an agreement for West to execute. Deposition of L. Burton at 102-03; Affidavit of R. Prupis at 4-5. This agreement provided:

> 1. West and Chief would form a new entity – 10% of the shares would be owned by CPC, which would elect one half of the Board of Directors;

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[6] Bellezza was in charge of working out all claims and had specific responsibilities (together with Paulus and others) in connection with Chief, *See* Affidavit of R. Prupis at 6-7 (Exhibit 4); Transcript of October 26, 1987 SIG Board of Director's Meeting at p. 5-6 (Exhibit 22). Other members of the New Jersey Group were all similarly responsible for various areas of the claims process. *Id.*

2. CPC would provide financial guarantees to SCI in order for SCI to issue the new bonds to Chief;

3. CPC would "arrange" for funds to be loaned to Chief-FL, to complete projects bonded by SCI;

4. Bonds issued prior to the agreement would be classified as Group A bonds and new bonds issued after the agreement would be classified as Group B-Bonds; and

5. CPC would receive 50% of the profits on all bonds in Group B and the Civic Centre project, but not less than $500,000.

September 10, 1987 Joint Venture Agreement (Exhibit 24).

The profit participation of CPC on construction projects bonded by SCI was a requirement for the surety bonds to be issued. Deposition of Westling at 89-90, 129, 137-40 (Exhibit 15); Deposition of Day at 87-90. The CPC fees were payable in addition to the premium payable to SCI. Deposition of Day at 112, 117-18. These CPC fees thus constituted an illegal and excessive premium in direct violation of insurance laws. *Id.* at 100-18.

West was extorted and coerced into agreeing to pay the illegal and excessive premiums to CPC. Furthermore, the arrangement of loans by CPC to Chief was a sham of CPC "fronting" for the SIG insurance subsidiaries, which actually did advance funds to Chief. Such loans were, however, prohibited under Florida insurance law. *Id.;* Deposition of M. Burton at 246-49 (Exhibit 25). Memo from Pershes to Lipkind (cc: Bellezza) (Exhibit 26).

The September 10, 1987 Joint Venture Agreement was executed at a time when there were claims and losses on the prior bonds to Chief (the A-bonds). *See* Deposition of L. Burton at 78-84; Deposition of Westling at 90-93; September 10, 1987 Joint Venture Agreement at p. 1. This agreement therefore allowed the New Jersey Group to hide the losses, and actually characterize them as an asset.

Prior to the closing of the First Fidelity loan, no report had been made of any claim on the Chief bonds. In fact, two Claims Summaries (Exhibit 27 and 28) were mailed to Beck and others at or around that time. There was no listing of the Chief bonds in these Claims Summaries. These Claims Summaries were also used to reflect the losses and reserves in the September 30, 1987 financial statements of SIG and its insurance subsidiaries. This information was not known by Beck. Affidavit of Beck at ¶3 (Exhibit 18).

The omission of the Chief claims was a material fact. The Chief claims eventually amounted to paid losses for SIG in excess of $6 million. *See* Claims Balance Report (Exhibit 29).

Thus, through the fraudulent misrepresentations of the New Jersey Group and others, Beck was unaware of the following material facts when he executed the First Fidelity guaranty:[7]

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[7] In its Statement of Facts at 16, the New Jersey Group distorts the contents of Beck's deposition. While Beck was aware of some aspects of the Chief transaction, the New Jersey Group conveniently omits the portions of Beck's deposition that

1. The September 10, 1987 Joint Venture Agreement existed.

2. Chief was in reality a claim and a loss to SIG.

3. The Claims Worksheets did not include a significant claim. In fact, Chief was SIG's largest claim.

4. SIG had changed its policy and was handling claims situations by issuing new bonds to defaulting contractors in hopes that they would work their way out of their claims against SIG.

5. The SIG financial statements fraudulently overstated the value of SIG by $3-6 million.

Affidavit of Beck at ¶3. Had Beck known of these facts, he would not have executed the personal guaranty. *Id.*; January 5, 1995 Deposition of Beck at 75; 125-27.

2. The fraudulent concealment of information regarding the illegal manner in which SIG was operated.

In early 1987, the New Jersey Group and others conspired to create a separate corporation, CPC, in order to cover up the illegal manner of operating SIG. Deposition of Westling at 18-23; Deposition of Day at 87-131 (Exhibit 23). CPC was established for the purpose of extorting

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detail the material aspects of the transaction that were withheld. *See* January 5, 1995 Deposition of Beck at 71-76, 125-27 (Exhibit 10); January 6, 1995 Deposition of Beck at 31-33 (Exhibit 13); Report of McClellan at 8 (and cites therein) (Exhibit 30).

contractors applying for surety bonds from the SIG insurance subsidiaries. *Id.* Deposition of Marshall at 47-50 (Exhibit 31). This was done by forcing the contractors to pay illegal fees (from 50% to 300% of the bond premium) to CPC to qualify for surety bonds, in addition to the surety bond premium payable to the SIG insurance subsidiaries. *See* Deposition of Westling at 180; Deposition of Day at 105-08.

Contractors seeking bonds from the SIG insurance subsidiaries were threatened (extorted) that, unless they agreed to pay these illegal fees to CPC, the bonds would not be issued. Deposition of Westling at 194; Deposition of Broder at 86-87 (Exhibit 32). Over one hundred contractors applying for SIG surety bonds were forced to agree to pay fees to CPC. *See* Client Listing of CPC (Exhibit 33). In most cases, the financial condition of these contractors prevented them from obtaining bonds elsewhere. Deposition of Day at 83, 120-21 (Exhibit 23).

One example of this illegal conduct involved JJW Construction, Inc. ("JJW"). JJW, an applicant for surety insurance at SIG's insurance subsidiary, was extorted to pay a $275,000 fee to CPC in exchange for the posting of a $500,000 letter of credit from Bellezza. *See* Deposition of Westling at 58-59 (Exhibit 15); Deposition of Broder at 42-45, 75-76; Deposition of L. Burton 126-30 (Exhibit 34); Deposition of M. Burton at 84-86, 336 and 343 (Exhibit 25); June 2, 1987 Agreement (Exhibit 35).

To prevent their illegal operation of SIG from being exposed, the defendants conspired to fraudulently conceal CPC operations from Beck. *See* Deposition of Westling at 12-17; Deposition of Kryszak at 57-58; Deposition

of M. Burton at 56-57. Thus, as a result of the fraudulent misrepresentation by the New Jersey Group and others, Beck was unaware of the following material facts when he executed the First Fidelity guaranty:

> 1. Contractors were being extorted to execute agreements with CPC as a condition to obtain bonds.
>
> 2. JJW had agreed to pay a $275,000 fee, in addition to the bond premium, to obtain bonds.
>
> 3. CPC was charging fees in excess of the premiums allowed under Florida law.

Affidavit of Beck at ¶4. Had Beck known of these facts, he would not have guaranteed the First Fidelity loan to SIG. *Id.;* January 5, 1995 Deposition of Beck at 273-74 (Exhibit 10).

3. The fraudulent misrepresentation of Beck's employment status.

In order to induce Beck to execute the guaranty, the New Jersey Group fraudulently concealed from Beck their plans to terminate him from his position as president of SIG. At that time, the New Jersey Group had already conspired to remove Beck's responsibilities and duties, and to eventually remove Beck from office, all in order to facilitate their illegal conduct.

In early December of 1987, some of the defendants, including Bellezza, met and discussed Beck's termination. Affidavit of R. Prupis at 9. These plans to terminate Beck were known by all of the SIG Board of Directors, other than Beck. *Id.;* Affidavit of Beck at ¶5. In fact, at this time,

the plans to terminate Beck were known throughout SIG. Deposition of Price at 26-30, 104-06 (Exhibit 36). However, by eliminating Beck from the "information loop," the New Jersey Group was able to hide this information from Beck. Beck had no idea of the conspiracy to terminate him until after his termination, which occurred 5 months after his execution of the guaranty. Affidavit of Prupis at 9; Affidavit of Beck at ¶5.

Thus, as result of the fraudulent misrepresentations and concealment by the New Jersey Group and others, Beck was unaware of the material fact that the defendants had plans to terminate him. Beck Affidavit at ¶7. Had Beck known of the plans to terminate him, he would not have executed the guaranty. *Id.*

C. The Defendants' Fraudulently Causing Beck To Fail To Sell His Stock.

The New Jersey Group and others made fraudulent misrepresentations to Beck that caused him to not sell his holdings of stock until it was too late. In fact, as early as the spring of 1987, Beck considered selling this stock. January 5, 1995 Deposition of Beck at 273-75. However, because of the fraudulent financial statements, the fraudulent concealment of the illegal manner in which the New Jersey Group were operating SIG and the fraudulent misrepresentations about the plans to terminate Beck, Beck did not sell the stock.[8] Had Beck known these things, he

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[8] All of this fraudulent conduct is detailed in Section I(B), *supra*.

would have sold the stock. *See* February 7, 1995 Deposition of Beck at 53-58; January 5, 1995 Deposition of Beck at 273-74.

D. The Defendants' Fraudulent Creation Of Causes For Beck's Termination.

The defendants purposely kept Beck out of the information loop at SIG. *See, e.g.*, Deposition of Price at 26-36, 39, 104-06 and 129-30 (Exhibit 36); Deposition of Bailey at 32-35 (Exhibit 16); Deposition of Mezey at 24, 36-37 (Exhibit 37); Deposition of Kane at 7-10 (Exhibit 38). In fact, SIG employees were specifically instructed to withhold essential information from Beck. *Id.;* Deposition of Sendaydiego at 23-25 (Exhibit 39).

Nevertheless, in the Spring of 1988, Beck began to discover some of the illegal conduct. He prevented the theft of over $2 million from SIG's subsidiary.[9] Deposition of Day at 66 (Exhibit 40); February 6, 1995 Deposition of Beck at 172-73. In addition, Beck contacted SIG's regulators and advised them that he had come to believe that the company's financial statements may have been overstated. Deposition of Hartsfield at 6-7, 19 (Exhibit 41); January 6, 1995 Deposition of Beck at 154-58 (Exhibit 12).

Seeing Beck as a threat to their continued criminal conduct, the New Jersey Group embarked on a scheme to fraudulently create causes to terminate Beck. *See* Deposition of Price at 26-36, 39, 104-06 and 129-30; Deposition of

[9] As more fully detailed in Section II(B), *infra*, after Beck's termination, the New Jersey Group proceeded to commit this theft.

Sendaydiego at 23-25, 42-46; Deposition of Weaver at 15-16, 71-73 (Exhibit 42); Deposition of Petigrow at 80-85 (Exhibit 43); February 6, 1995 Deposition of Beck at 171-73 (Exhibit 12). Through a series of secret meetings that Beck was excluded from in violation of Florida law, the New Jersey Group and the other defendants hatched their conspiracy with Firemark.[10]

Evidence of Firemark's falsification of grounds to terminate Beck and its involvement in the conspiracy have been discovered. In a recent deposition, a former Firemark employee testified that Firemark's chairman, M. Morrissey, confessed that Firemark fabricated things about Beck and recommended his termination because J. Morrissey wanted Beck's job. Deposition of Smith at 17-18 (Exhibit 44). This former Firemark employee also testified that Firemark fabricated documents to substantiate its recommendation to terminate Beck. *Id., see also* Deposition of Piraneo at 42-43 (same) (Exhibit 47). As

[10] The failure to give proper notice of a meeting of the board of directors renders that meeting illegal, and the actions taken at the meeting null and void. Fla. Stat. §607.0822, SIG's By-Laws at §2.6 (Exhibit 45). *Shelvin v. Nat'l Conservation Corp.*, 605 N.Y.S.2d 593 (App.Div. 1993); *Valerino v. Little*, 490 A.2d 756 (Md.App. 1985); *State v. D.A. Davidson & Co.*, 517 P.2d 722 (Mont. 1973).

The defendants attended at least two such secret meetings on April 21, 1988 and May 12, 1988, from which Beck was purposefully and illegally excluded. Deposition of Sparber at 13 (Exhibit 46). It was during the May 12, 1988 meeting that the defendants decided to oust Beck. *Id.* Furthermore, the minutes of the April 21, 1988 and May 13, 1988 "board meetings" do not exist, despite statutory mandates to maintain these records. *See* Fla.Stat. §607.1601(1).

part of Firemark's reward for its participation, the defendants gave J. Morrissey Beck's job. *See* Deposition of Bailey at 80-81 (Exhibit 16); Deposition of M. Morrissey at 372-73 (Exhibit 48).

II. EVIDENCE OF PREDICATE ACTS AGAINST OTHER VICTIMS

Noticeably lacking from the New Jersey Group's Motion for Summary Judgment is any argument against the substantial evidence of the predicate acts committed by the defendants against other victims, all of which form the *pattern* of racketeering conduct. Some of this substantial evidence was submitted to a New Jersey Court regarding the defendants' illegal scheme, as a defense to an action by the New Jersey Group against Beck and others. After reviewing this evidence, the New Jersey judge ruled:

> Defendant Beck has produced extensive documentation in which he asserts that his guarantee to Fidelity was induced by the fraud of Group [defendants Bellezza, Olstein and Paulus]; that he was induced to assume the position of President of SIG by misrepresentations by Group as to the assets of SIG; that Group and other defendants improperly mulcted the assets of SIG, causing it to become insolvent; that Bellezza and Paulus used corporations known as Chief Structures, Inc. and Construction Performance Corporation as instrumentalities to profit in violation of Florida law. Alleged also are other claims of fraud and illegality which need not be specified.

> Suffice it, that Beck's position is supported by evidence which raises issues of fact.

June 24, 1991 opinion at 2-3, *First Fidelity Bank v. SIG, et al.*, (Exhibit 49).

The following is a brief, additional synopsis of *some* of these predicate acts. Again, these predicate acts, while in some ways relate to the damages suffered by Beck, are pled and will be proved solely to satisfy RICO's pattern requirement.

A. ***Extortion of Contractors*** – Through the criminal conduct of the New Jersey Group and others, hundreds of contractors were extorted. Each such act of extortion constitutes at least one RICO predicate act. Some examples of this extortion are contained in Section I(C)(2), *supra*. *See also* Deposition of Westling at 34-35, 58-61, 180, 194, 202-05 (Exhibit 15); Deposition of L. Burton at 127-28 (Exhibit 17); Deposition of M. Burton at 100-01, 336, 344 (Exhibit 25); Deposition of Day at 103 (Exhibit 23) (CPC was set up to extort money from contractors).

B. ***Looting*** – The looting of SIG is described at length in Beck's Verified Crossclaim at ¶¶20-22. Some examples include the following acts of theft that took place after Beck's termination:

> 1. $2.5 million of policy holder surplus was stolen from SIG's subsidiaries and transferred to Bellezza, Olstein and others. Expert Report of Robert Shapiro at 5-7 (Exhibit 50) (and cites therein); Expert Report of Wayne Kauth at 9-12 (Exhibit 51) (and cites therein); Deposition of Day at 66-68 (Exhibit 40).

2. $4 million of policy holder surplus was stolen from SIG's subsidiaries and transferred to First Fidelity Bank. Expert Report of Shapiro at 6-7 (and cites therein); Expert Report of Kauth at 3, 11-12 (and cites therein).

3. Substantial funds were taken from one of SIG's subsidiaries by the back-dating of a reinsurance pooling agreement. Expert Report of Shapiro at 5 (and cites therein); Expert Report of Kauth at 7-8 (and cites therein).

4. $3.6 million of surplus interest was paid to SIG and used primarily to fund debentureholder payments (the vast majority of which were associated with the defendants), while this money should have been paid to other parties. Expert Report of Kauth at 8 (and cites therein); Deposition of Day at 27, 64 (Exhibit 52).

See generally December 14, 1994 Deposition of Beck at 161-68 (Exhibit 53). While the New Jersey Group attempts to minimize the illegality of these acts, there can be no doubt of their criminal nature. *See* Expert Report of Wayne Kauth (Exhibit 51); Complaints of FL-DOI (Exhibits 4, 5 and 6).

C. ***Fraudulent Financial Statements*** – The fraudulent financial statements created by the New Jersey Group and others were not only used to victimize Beck, but were also mailed to regulators, shareholders and creditors – each time, constituting a RICO predicate act. *See* December 14, 1994 Deposition of Beck at 182-83; Deposition of Petigrow at 25-26, 153-157 and 182 (Exhibit 43). The manner in which the New Jersey Group and others falsified the financial statements is set forth in

detail in Section I(C)(2). In addition, after Beck's termination, the New Jersey Group and others further falsified the financial statements of SIG. Expert Report of Shapiro at 6-7 (and cites therein); Expert Report of Kauth at 10-12 (and cites therein).

D. ***Fraudulent Promises To Indemnify*** – Examples of the fraudulent representations by members of the New Jersey Group to indemnify SIG's insurance company subsidiaries to allow bonds to be written to contractors in which the New Jersey Group had some interest is detailed in Section I(B), *supra*. A further example of this fraudulent conduct relates to Aldrich Construction. *See* Affidavit of L. Burton at 2 (Exhibit 54); Affidavit of R. Prupis at 2-3; Deposition of L. Burton at 98-115 (Exhibit 34).

Respectfully submitted,

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By: /s/ Jay Starkman
Jay Starkman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail this 20th day of April, 1995, to all counsel on the attached service list.

/s/ Jay Starkman
Jay Starkman

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 91-8121-CIV-ROETTGER

ROBERT A. BECK, II

Plaintiff,

vs.

RONALD M. PRUPIS, et al.,

Defendants.
_____/

PLAINTIFF, ROBERT A. BECK, II'S, MEMORANDUM OF LAW IN OPPOSITION TO THE NEW JERSEY GROUP'S MOTION FOR SUMMARY JUDGMENT

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Plaintiff, Robert A. Beck, II ("Beck"), files this Memorandum of Law in Opposition to the New Jersey Group's[1] Motion for Summary Judgment.

[1] The New Jersey Group refers to defendants Leonard Bellezza, William Paulus, Jr., Ernest Sabato and Harry Olstein.

SUMMARY OF ARGUMENT

In its Motion for Summary Judgment, the New Jersey Group does nothing but repeat the standing arguments that were raised in its unsuccessful Motion to Dismiss. Once again, its arguments ignore the applicable law, which remains unchanged since that time. Furthermore, by selectively citing evidence, the New Jersey Group ignores the substantial evidence of the predicate acts committed directly against Beck – the acts by which Beck has suffered extensive damages and for which he has brought this RICO action. In fact, the damages that Beck suffered by reason of these predicate acts are classic RICO damages for which he has standing. The New Jersey Group simply cannot meet its heavy burden of establishing the complete absence of any genuine issues of fact. Accordingly, its Motion for Summary Judgment, and its concurrent attempt to escape accountability for an enormous criminal venture, must be denied.

ARGUMENT

I. STANDARD OF REVIEW FOR MOTION FOR SUMMARY JUDGMENT

Summary judgment is a drastic remedy and must be approached cautiously. *Transource International, Inc. v. Trinity Industries, Inc.*, 725 F.2d 274, 279 (5th Cir. 1984). Summary judgment is improper unless the underlying facts are undisputed, and the record is completely devoid of evidence from which reasonable persons might draw conflicting inferences about the facts. *Hall v. Diamond M Co.*, 732 F.2d 1246, 1248 (5th Cir. 1984). There must be *no*

genuine issue as to *any* material fact. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 467 (1961).

The burden of establishing the absence of a genuine issue of fact is on the movant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The court must view the evidence in a light most favorable to the non-moving party and indulge every reasonable inference from the facts in his favor. *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir. 1987). Before summary judgment is granted, "the facts and inferences [must] point so strongly and overwhelmingly in favor of one party, that the Court believes that reasonable men could not arrive at a contrary verdict. . . . " *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). "A litigant has the right to a trial where there is the slightest doubt as to the facts." *Peckham v. Ronrico Corp.*, 171 F.2d 653, 657 (1st Cir. 1948).

II. BECK HAS STANDING TO ASSERT HIS RICO CLAIMS.

Under 18 U.S.C. §1964(c), a plaintiff can sue for a violation of RICO if "he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Thus, in order to have standing under RICO, a plaintiff must show: a violation of section 1962, an injury to business or property and that the violation caused the injury. *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir. 1994).

The causation element of RICO's standing criteria requires RICO plaintiffs to prove proximate causation before they are permitted to recover. *Holmes v. Securities*

Investor Protection Corp., 112 S.Ct. 1311, 1317-1318 (1992). This requirement entails applying "[c]ausation principles generally applicable to tort liability" to RICO cases. *Cox*, 17 F.3d at 1399. A proximate cause, however, is not the same thing as a sole cause. *Id.* The test for proximate causation is whether the defendant's actions are "a substantial factor in the sequence of responsible causation," and whether "the injury is reasonably foreseeable or anticipated as a natural consequence." *Id.; Standardbred Owners Ass'n v. Roosevelt Raceway*, 985 F.2d 102, 104 (2d Cir. 1993).

A. Beck Has Standing To Assert His RICO Claim For The New Jersey Group's Fraudulent Inducement To Extend A $150,000 Loan To SIG.

Beck's damages relating to the $150,000 fraudulently induced loan were proximately caused by the New Jersey Group's RICO violations. These claims are based upon the predicate acts of mail and wire fraud.[2] Beck has introduced substantial evidence from which a jury could find that the New Jersey Group is responsible for committing these predicate acts.

Mail or wire fraud occurs when a person intentionally participates in a scheme to defraud another of money or property, and uses (or knowingly causes another to use) the mails or wires in furtherance of that

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[2] In the Verified Complaint, Beck details over 40 specific instances of the defendants' use of the mail and wires, many of which are set forth in Beck's Response to the New Jersey Group's Statement of Facts ("Beck's Statement of Material Facts"). *See also* Beck's RICO Case Statement (Exhibit 2).

scheme. *Pelletier v. Zweifel*, 921 F.2d 1465, 1498 (11th Cir. 1991).[3] One "knowingly causes" another to use the mails or wires "[w]here one does an act with knowledge that [their] use will normally follow in the ordinary course of business, or where such can reasonably be foreseen, even though not actually intended. . . . " *Pereira v. United States*, 347 U.S. 1, 8-9, (1954) (citations omitted). Thus, knowing participants in a scheme to defraud are legally liable for their co-schemers' use of the mails or wires in furtherance of that scheme. *U.S. v. Lothian*, 976 F.2d 1257, 1263 (9th Cir. 1992); *see also R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1354 (5th Cir. 1984).

For a plaintiff to recover under RICO for mail or wire fraud damages, he must show that he was a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme. *Pelletier*, 921 F.2d at 1499. The substantial evidence presented by Beck, at minimum, raises a jury question on this issue. To further the New Jersey Group's fraudulent scheme, they made fraudulent representations to Beck, orally and in writing, that Beck would continue to be Chief Executive Officer of SIG. Statement of Material Facts at 5-8. In addition, the Defendants fraudulently

[3] It is not necessary that the scheme contemplate the use of the mails as an essential element. *United States v. Maze*, 414 U.S. 395, 400 (1974); *U.S. v. Hollis*, 971 F.2d 1441, 1448 (10th Cir. 1992). It is sufficient that the mailing caused is a "part of the execution of the fraud," *Kann v. United States*, 323 U.S. 88, 95, (1944), or is "incident to an essential part of the scheme," *Pereira*, 347 U.S. at 8, 74 S.Ct. at 362, or is "a step in the plot." *Hollis*, 971 U.S. at 1448 (citation omitted).

concealed their illegal conduct from Beck.[4] *Id.* As a result of these fraudulent misrepresentations, Beck was induced into making the unsecured $150,000 loan. *Id.*

Contrary to the New Jersey Group's contention, this RICO injury suffered by Beck is not derivative, but is sufficient to establish standing. *See Pelletier v. Zweifel*, 921 F.2d at 1465; *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987) (complaint alleging fraudulent inducement to make capital contributions and a personal guaranty could state a RICO claim); *GICC Capital Corp. v. Technology Finance Group*, 30 F.3d 289 (2nd Cir. 1994) (creditor has individual standing as long as his injuries meet proximate cause test); *Ashland Oil, Inc. v. Arnet*, 875 F.2d 1271 (7th Cir. 1989) (plaintiff who reasonably relies on defendant's fraudulent financial statements and other misrepresentations has civil RICO standing); *Morley v. Cohen*, 888 F.2d 1006 (4th Cir. 1989) (plaintiff who is fraudulently induced into investing in defendant's scheme has RICO standing); *In re Colonial Ltd. Partnership Litigation*, 854 F.Supp. 64, 104-05 (D.Conn. 1994) (allegations that defendant's fraudulent conduct induced plaintiffs to purchase their limited partnership interest, and that this result was reasonably foreseeable to defendants were sufficient for proximate cause and standing; plaintiffs' claims were not derivative, as plaintiffs did not merely claim that they suffered diminution in the value of their investments); *Haggiag v. Brown*, 728 F.Supp. 286, 295

[4] Nondisclosure of a material fact with intent to create a false or fraudulent misrepresentation constitutes mail and wire fraud. *Pelletier*, 921 F.2d at 1508.

(S.D.N.Y. 1990) (allegation that plaintiffs were fraudulently induced into loaning money to defendant states viable RICO claim).

Instead of refuting the validity of Beck's claim that he was induced into extending the loan by the New Jersey Group's fraud, the New Jersey Group attempts to sidestep the evidence by arguing that Beck's claim is time-barred. *See* New Jersey Group's Memorandum of Law at 7-8. This argument, however, is misplaced. Beck is not attempting to raise a "new claim" for securities fraud based on the private placement. Rather, Beck's claim is based upon the fact that he was induced to extend the loan by the New Jersey Group's fraudulent conduct.

In fact, this claim is not new at all, as Beck's Complaint contains these allegations. *See* Complaint at ¶¶20-21. The New Jersey Group's argument amounts to a Rule 9(b) specificity claim. However, "[t]he specificity requirements of [Rule] 9(b) have been imposed to ensure that a defendant is apprised of the fraud claimed in a manner sufficient to permit the framing of an adequate responsive pleading. A party who fails to raise a 9(b) objection normally waives the requirement." *United National Records, Inc. v. MCA, Inc.*, 609 F.Supp. 33, 39 (N.D. Ill. 1984); 5A C. Wright & A. Miller, *Federal Practice and Procedure*, §1394 at 778 (2d ed. 1990) (and cases cited therein); *see also Todaro v. Orbit Int'l Travel*, 755 F.Supp. 1229, 1233 (RICO defendants who answered complaint and failed to raise 9(b) objection to complaint's mail and wire fraud allegations waived objection). The New Jersey Group, having failed to raise this objection in its Answer, has waived its ability to now raise it. *See* New Jersey Group's Answer and Affirmative Defenses (Exhibit 55).

B. Beck Has Standing to Assert His Claim That He Was Fraudulently Induced Into Guarantying The $7.5 Million First Fidelity Loan.

Beck has presented substantial evidence that, pursuant to a scheme to defraud Beck and others – a scheme furthered by the New Jersey Group's use of the mails and wires – Beck was fraudulently induced to personally guaranty a $7.5 million loan from First Fidelity Bank to SIG, by which he has been directly injured. *See* Beck's Statement of Material Facts at 8-15. The Eleventh Circuit specifically has held that these allegations state harm suffered by an individual *directly*, not derivatively.[5] *Warner*, 828 F.2d at 1531.

The specific damages sought by Beck in relation to this claim are the attorneys' fees he incurred in defending the First Fidelity suit. While the Eleventh Circuit has yet to decide the issue, the weight of decisional precedent holds that attorneys' fees (or other expenses) incurred as a result of Defendants' RICO violations are recoverable in a RICO suit.[6] *See Stochastic Decisions Inc. v. Didomenico,*

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[5] In light of the Eleventh Circuit's unequivocal statement of the law on this issue, any citation by the New Jersey Group to contrary law from other jurisdictions is misplaced.

[6] The New Jersey Group's reliance on *Local 355 v. Pier 66 Co.*, 599 F.Supp. 761, 765 (S.D. Fla. 1984), for the proposition that attorneys' fees *cannot* be an element of RICO damages, is misplaced. An exhaustive search has failed to locate even a single Circuit that echoes such a view. Also, nothing in the language of the RICO statute itself supports this additional standing hurdle. The decision in *Local 355* seems to be based upon the fact that the claims raised by the plaintiff were completely preempted by the National Labor Relations Act. *See*

995 F.2d 1158, 1167 (2nd Cir. 1993) (legal fees may constitute RICO damages if proximately caused by a RICO violation); *Malley-Duff & Associates v. Crown Life Ins. Co.*, 792 F.2d 341, 355 (3d Cir. 1986) (litigation expenses caused by predicate acts recoverable under RICO); *Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496 (9th Cir. 1985) (same); *Alexander Grant & Co. v. Tiffany Industries*, 742 F.2d 408, 411 (8th Cir. 1984) (standing to sue under RICO for attorneys' fees incurred as a result of S.E.C. investigation); *Miller Hydro Group v. Popvitch*, 851 F.Supp. 7, 13 (D. Me. 1994) (litigation fees caused by defendants' RICO violations are recoverable), *vacated, but then readopted in*, 770 F.2d 717 (8th Cir. 1985).

The attorneys' fees incurred by Beck in defending the First Fidelity suit represent a proximately caused injury, the redress of which Beck has standing to pursue. Beck was fraudulently induced by the defendants to personally guaranty the loan, as a result of a fraudulent scheme fueled by the predicate acts of mail and wire fraud. As part of this scheme, the New Jersey Group, together with others, falsified SIG records and financial statements, resulting in a material overstatement of SIG's value. *See* Beck's Statement of Material Facts at 9-13. As the New Jersey Group intended, Beck relied upon these fraudulently created financial statements and estimates in his assessment of the likelihood that SIG would be able to repay the First Fidelity loan. *Id.* As part of their scheme,

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Id. at 763-64. The Court's two paragraph discussion of the attorneys' fees' claims and RICO standing is an afterthought, and, in light of the weight of authority to the contrary, should be ignored.

the New Jersey Group also conspired to fraudulently conceal their illegal conduct. *Id.* at 13-14. Had Beck known of this conduct, he would not have guaranteed the loan. *Id.* In order to further induce Beck to execute the personal guaranty, the New Jersey Group fraudulently concealed from Beck its plan to terminate him. *Id.* at 15. Had Beck known of the plan to terminate him, he would not have executed the guaranty. *Id.*

When SIG finally collapsed under the weight of the Defendants' racketeering, the First Fidelity loan went into default and Beck was sued on the guaranty. The Defendants, actions were "a substantial factor in the sequence of responsible causation," and the litigation fees incurred by Beck were "reasonably foreseeable or anticipated as a natural consequence." *Cox*, 17 F.3d at 1399; *Standardbred Owners Ass'n v. Roosevelt Raceway*, 985 F.2d 102, 104 (2d Cir. 1993).

Beck's resulting damages can hardly be classified as "incidental." RICO plaintiffs, like tort plaintiffs in general, have a duty to mitigate their damages. *Bieter Company v. Blomquist*, 987 F.2d 1319, 1329 (8th Cir. 1993); *Boards of Managers of Dunbar Lakes Condominium v. Dunbar Homes Inc.*, 1991 WL 18194 (N.D. Ill.). Had Beck not defended the First Fidelity action and pursued the legal malpractice claim, Beck's damages flowing from the guaranty would have been substantially higher.[7] Beck's attorneys' fees, therefore, represent the costs to Beck of successfully mitigating the guaranty damages, as he is

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[7] The contribution claim against Beck was for over $3.5 million.

required to do. It makes no sense that now, having successfully fulfilled his duty to mitigate damages on a claim for which RICO provides standing, Beck would lose that standing because his mitigation efforts were so successful that the only damages that remain are the costs of the mitigation itself.[8]

C. Beck Has Standing To Assert His Claim That He Was Unlawfully Terminated Pursuant To The New Jersey Group's RICO Conspiracy.[9]

1. The Eleventh Circuit has yet to determine whether a whistleblower has standing to assert a RICO conspiracy claim under §1962(d).

The New Jersey Group incorrectly argues that *O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989), *cert. den.*, 496 U.S. 926 (1990), stands for the proposition that a whistleblower does not have standing to assert a RICO conspiracy claim. In *O'Malley*, a motion was filed seeking

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[8] Beck's recovery of $425,000 from the Lampf, Lipkind settlement has not made him whole for the damages suffered by him due to the First Fidelity guaranty. Beck's total attorneys' fees in defending that case exceed $800,000. Beck is clearly not attempting to recover more than once. Also, the entire $425,000 did not go towards reimbursing Beck for his attorneys' fees in the First Fidelity matter. The sum needs to be allocated between the number of cases that it settled. This issue is simply inappropriate for summary judgment.

[9] In a brazen attempt to have another bite at the apple, the New Jersey Group raises the identical argument already rejected by this Court when it denied the New Jersey Group's Motion to Dismiss. *See* Beck's Statement of Facts at 5.

dismissal of a complaint containing two separate civil RICO counts: Count I of the complaint alleged a substantive violation under 18 U.S.C. §1962(c); Count II alleged a RICO conspiracy in violation of 18 U.S.C. §1962(d). *Id.* at 1559. Though *O'Malley* barred claims based on whistleblower allegations, its holding was expressly limited to the complaint's substantive RICO count. *Id.* at 1557. The court's discussion of the RICO conspiracy count was completely separate from its holding on the issue of standing, dismissing the RICO conspiracy count for a lack of specificity:

> Count II need not detain us long. The district court dismissed Count II – the RICO conspiracy count – because the allegations of a conspiracy were merely conclusory and unsupported by any factual allegations. We find that dismissal to be proper.

Id. at 1560 (citations omitted). Accordingly, *O'Malley* expressly left undecided the issue of whether a plaintiff had standing to raise a RICO conspiracy count based on whistleblower injury.[10]

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[10] The New Jersey Group's reliance on *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), and *Schenk v. Southeast Banking Corp.*, 725 F.Supp. 1231 (S.D. Fla. 1989), is similarly misplaced. In *Morast*, the complaint alleged that the plaintiff was discharged without justification and purely in retaliation for his reporting an irregular transaction and cooperating with the subsequent investigation. *Id.* at 929. *Morast*'s holding can hardly be characterized as a proscription of RICO conspiracy claims grounded on whistleblower injury, especially given the court's suggestion that its holding might have been different if the complaint had alleged termination as a result of a refusal to participate in the defendants' illegal scheme. In *Schenk*, it is not

This issue remains undecided in this Circuit as of the date of this Memorandum.

2. The Eleventh Circuit should echo the Circuits that have held that a whistleblower should have standing to assert a RICO conspiracy claim.

In its Motion for Summary Judgment, the New Jersey Group ignores the weight of authority from other jurisdictions which hold that a whistleblower has standing to assert a RICO conspiracy claim. *See, e.g., Shearin*, 885 F.2d 1162 (3d Cir. 1989); *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344 (7th Cir. 1992); *Callan v. State Chemical Manufacturing Co.*, 584 F.Supp. 619 (E.D. Pa. 1984). *See also Flinders v. Datasec Corp.*, 742 F.Supp. 929 (E.D. Va. 1990) (injury from overt act, not necessarily a predicate act of racketeering, is sufficient to confer standing if the overt act is wrongful). It is these cases that should guide this Court's ruling in the instant case.

The courts that have rejected whistleblower standing under §1962(d) have typically based their decision on the analysis that the whistleblower's injuries did not stem from a predicate act within the purview of §1961(1). *See, e.g., Bowman v. Western Auto Supply Co.*, 985 F.2d 383 (8th Cir. 1993). However, as pointed out by the Seventh Circuit, this analysis ignores the clear language of the statute:

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clear whether the plaintiff even raised a RICO conspiracy count in his complaint.

> [Section] 1964(c) allows suits by anyone "injured . . . by reason of a violation of §1962." Section 1962(d) prohibits conspiracies, so a person harmed by the conspiracy has been injured "by reason of" a RICO violation. Congress could have written RICO to state that only those injured by reason of predicate acts committed as part of a RICO violation could sue. It did not, and for courts to read §1964(c) as if that is what Congress wrote would be "tantamount to rewriting the statute."

Schiffels, 978 F.2d at 349-50. It is axiomatic that the plain words of a statute are controlling as to the statute's meaning and effect. *See, e.g., Sedima*, 473 U.S. at 495 n.13. The Supreme Court has already applied this maxim to the RICO statute. *Id.* ("There is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement.").

Accepting the New Jersey Group's distorted interpretation of RICO would "assure employers that when troublesome employees threaten to disclose the commission of RICO violations, those employees can be threatened with termination to keep such violations hidden from public view . . . , ensur[ing] that fewer instances of fraud will be uncovered and that Congress's intent in enacting the RICO statute will be frustrated." *Bowman*, 985 F.2d at 389 (Heany, J., dissenting). Surely, there is no appropriate rationale for writing into the RICO statute a requirement that Congress expressly chose not to include.

Rejection of the predicate act injury requirement is also warranted by traditional concepts of conspiracy law. A conspiracy to violate RICO does not "require anything beyond that required for a conspiracy to violate any other

crimes." *United States v. Weissman*, 899 F.2d 1111 (11th Cir. 1990) (citation omitted); *United States v. Napolitan*, 791 F.2d 489 (7th Cir. 1986). The conduct targeted by §1962(d), like that of all laws prohibiting conspiracies, is the *agreement* to violate the substantive provisions of RICO, not the actual substantive violations, themselves. *United States v. Angiulo*, 847 F.2d 956, 964 (1st Cir. 1988); *Shearin*, 885 F.2d at 1169; *United States v. Phillips*, 665 F.2d 971, 1038 (5th Cir.), *cert. denied*, 457 U.S. 1136 and 459 U.S. 906 (1982); *United States v. Glecier*, 923 F.2d 496, 500 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 54 (1991); *United States v. Brooklier*, 685 F.2d 1208, 1222 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983). Thus, while §1962(d) requires an agreement to commit predicate acts, it does not require that any predicate acts actually be committed. *Shearin*, 885 F.2d at 1169; *Phillips*, 664 F.2d at 1038.

> [S]ince RICO conspiracy does not require the actual commission of a predicate act, it follows that the act causing plaintiff's injury need not be a predicate act of racketeering. A person directly injured by an overt act in furtherance of a RICO conspiracy has been injured "by reason of" the conspiracy. Since a conspiracy to violate RICO's substantive provisions is itself a violation of RICO, *see* 18 U.S.C. §1962(d), a person injured "by reason of" the conspiracy has been injured "by reason of" the RICO violation. That is all that §1964(c) requires for standing to bring a civil RICO action.

Schiffels, 978 F.2d at 348-49.

Last, rejection of the New Jersey Group's argument is also in accord with the Supreme Court's mandate that

"RICO is to be read broadly," with a view toward "activity which RICO was designed to deter," and to be "liberally construed to effectuate its remedial purposes." *Sedima*, 473 U.S. at 497-500. Given this edict, "it would be anomalous to allow plaintiffs to recover for harm suffered from investment in, or control or conduct of, a pattern of racketeering, yet preclude recovery for conspiracy to commit these violations simply because the overt act that furthers the conspiracy does not itself qualify as racketeering." *Shearin*, 885 F.2d at 1170.

D. Beck Has Standing To Assert His RICO Claim For The New Jersey Group's Fraudulent Inducement To Purchase $75,000 In SIG Stock.

The $150,000 debenture Beck purchased from SIG was sold to him in a "unit" that included $75,000 in SIG stocks. *See* Statement of Material Facts at 7. The same fraudulent misrepresentations and omissions regarding Beck's position as SIG's Chief Executive Officer, the New Jersey Group's illegal practices and their fraudulent promises to indemnify contractors are thus at issue. *See* Section II(A), *supra*. Beck relied on these in making the purchase, which he would not have otherwise made. This injury is not derivative, and is sufficient to establish standing. *See Pelletier v. Zweifel*, 921 F.2d at 1506 (plaintiff's allegations that he relied on defendant's promise to transfer certain managerial controls to plaintiff, that defendant would not have purchased certain stock without such guarantees and that he would not have purchased stock had knowledge of misappropriation of the company's funds not been fraudulently kept from him, satisfy section 1964(c)'s proximate cause requirement).

E. Beck Has Standing To Assert His RICO Claim For The New Jersey Group's Fraudulent Inducement Not To Sell His SIG Stock.

In addition to the above-described $75,000 in SIG stocks, Beck owned substantial additional stock in the New Jersey Group's Enterprise. Beck's standing to bring a claim for the loss of this additional stock flows from the fact that Beck seeks redress of harms visited upon him directly, not the general diminution of stock value suffered indirectly by the majority of the other stockholders. *See generally, Pelletier,* 921 F.2d at 1506. The New Jersey Group, pursuant to their fraudulent scheme furthered by mail and wire fraud, directly and fraudulently induced Beck not to sell his stock until it had significantly lost its value. In fact, in early spring of 1987, Beck considered selling his stock. *See* Statement of Material Facts at 15-16. However, because of the fraudulent financial statements, the fraudulent concealment of the illegal manner in which the New Jersey Group were operating SIG and the fraudulent misrepresentations about the plans to terminate Beck, Beck did not sell this stock. *Id.*

III. BECK'S CLAIMS ARE NOT BARRED BY RES JUDICATA OR COLLATERAL ESTOPPEL.[11]

In its Motion for Summary Judgment, the New Jersey Group argues that Beck's RICO claims are barred by the

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[11] Again seeking another bite at the apple, the New Jersey Group argues that Beck's claims are barred by res judicata – an argument already rejected by this Court when it denied the New Jersey Group's Motion to Dismiss. *See* Statement of Material Facts at 5.

doctrine of res judicata, based upon the Florida Circuit Court's dismissal of some of Beck's prior RICO counts. The New Jersey Group, however, conveniently ignores the fact that Beck's current RICO claims seek damages based upon entirely new predicate acts that were not, and could not have been, alleged in the Florida Circuit Court action.

Several identities must coalesce before a matter is made res judicata: 1) identity of parties; 2) identity of cause of action; 3) identity of thing sued for; 4) and identity of quality in party for or against whom suit is made. *Albrecht v. State,* 444 So.2d 8, 11-12 (Fla. 1984). Where a second suit is between the same parties, but based on a different cause of action from the first suit, the prior judgment will not have res judicata effect. *Id.* The determining factor in deciding whether two claims are part of the same cause of action is whether the facts or evidence necessary to maintain suit are the same in both actions. *Id.*

An identity of causes of action is not present in this case. The RICO counts contained in the first suit filed in Florida Circuit Court were based entirely on Beck's termination, and no allegations were raised dealing with the fraudulently induced personal guaranty or unsecured loan.[12] *See* Beck's Statement of Material Facts at 3-5. The

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[12] In its Motion to Dismiss at 12, the New Jersey Group contends that the Florida Circuit Court action included an allegation that Beck was fraudulently induced to guaranty the First Fidelity loan in paragraph 32(a) of the Complaint. This is simply untrue. On the contrary, no such allegation is present anywhere in the Florida Circuit Court complaint. *See* Florida Circuit Court Complaint (Exhibit 3).

facts and evidence necessary to maintain suit for Beck's loan and guaranty damages are substantially different from the facts and evidence that would have been presented in the Florida Circuit Court action, which did not involve these claims. *Id.*

The substantive RICO counts in Beck's initial Complaint filed in Florida Circuit Court sought to recover damages that Beck sustained as a whistleblower. Beck's claims for these damages were specifically included in each of the Complaint's substantive RICO counts. Florida Circuit Court Complaint at ¶¶74-76, 79, 83 and 87 (Exhibit 3). Conversely, the instant Complaint does not include a claim for whistleblower damages in any of its substantive claims. Complaint at ¶¶129-135, 136-138 and 139-141. The only civil RICO claim for whistleblower damages is found in the Complaint's RICO conspiracy count, raised pursuant to §1962(d), which, as more fully detailed in note 14, *infra*, was never adjudicated.

The New Jersey Group also argues that res judicata should bar Beck's substantive claims because the predicate acts committed against other individuals is identical in both cases. Even where the second action includes the facts and evidence that were presented in the first action as a subcomponent of the total facts and evidence to be presented, however, res judicata does not apply if the essential "focus" of the second action is different from that of the previous action. *See Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1510 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986). In the instant case, the focus of the substantive claims is the damages Beck suffered by reason of being fraudulently induced to guaranty and extend loans. These claims were not (and could not have

been[13]) pled in the Florida Circuit Court action. The remaining predicate acts are pled solely to fulfill the pattern requirement. The new predicate acts constitute new and independent causes of action. *See Bivens Gardens Office Building v. Barnett Bank*, 906 F.2d 1546 (11th Cir. 1990) (separate injuries resulting from separate predicate acts constitute independent causes of action), *cert. denied*, 500 U.S. 910 (1991); *Spiegel v. Continental Illinois National Bank*, 790 F.2d 638 (7th Cir.) (res judicata did not bar subsequent RICO action, which involved same parties and allegations of first RICO action, in that second action involved two newly alleged mail fraud predicate acts which occurred after filing of first action), *cert. denied*, 479 U.S. 987 (1986).[14]

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[13] Beck could *not* have raised these claims in the Florida Circuit Court action. When that action was filed, Beck had not yet suffered damages from these predicate acts because SIG had not yet declared bankruptcy – Beck had not yet sustained any injury as a result of the fraudulently induced unsecured loan and personal guaranty. This did not occur until after the prior action was dismissed. *See Bivens*, 906 F.2d 1546; *Colonial Penn Ins. Co. v. Value Rent-a-Car*, 814 F.Supp. 1084 (S.D. Fla. 1992).

[14] The New Jersey Group does not argue that Beck's RICO conspiracy claim, which does seek damages suffered by Beck as a whistleblower, is barred by res judicata, nor could it, for that claim was voluntarily dismissed without prejudice by Beck in the Florida Circuit Court action. *See* Exhibit "C" to New Jersey Group's Motion to Dismiss. Under Florida law, a claim which is voluntarily dismissed does not support a defense of res judicata in a subsequent action because the voluntary dismissal does not constitute an adjudication on the merits. *New Port Largo, Inc. v. Monroe County*, 706 F.Supp. 1507 (S.D. Fla. 1988); *Wormser v. State*, 384 So.2d 310 (5th DCA 1980).

Furthermore, a final order is necessary for application of the doctrine of res judicata. *Thomson v. Petherbridge*, 472 So.2d 773, 774 (Fla. 1st DCA 1985). Where, as is the case here, certain factually interrelated counts of a plaintiff's complaint were dismissed with prejudice, and subsequently the plaintiff voluntarily dismissed the remaining count, the order of dismissal with prejudice is not a "final order," and does not bar refiling of any or *all* of the counts. *Hendrick v. CSX Transportation, Inc.*, 575 So.2d 709, 712-13 n.5 (Fla. 1st DCA 1991).

CONCLUSION

For the foregoing reasons, the New Jersey Group's Motion for Summary Judgment should be denied in its entirety.[15]

Respectfully submitted,
Elizabeth J. du Fresne, P.A.
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and

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[15] Even if the federal claims were to be dismissed, this Court should retain jurisdiction over Beck's pendent state law claims, especially given that, otherwise, those state law claims would be time-barred. *See, e.g., Garner v. Pearson*, 732 F.2d 850, 853 (11th Cir. 1984).

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By: /s/ Jay Starkman
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail this 20th day of April, 1995, to all counsel on the attached service list.

/s/ Jay Starkman
Jay Starkman

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Due to their volume, the Exhibits to Plaintiff, Robert A. Beck, II's, Memorandum of Law in Opposition to the New Jersey Group's Motion for Summary Judgment, which are part of the record below (R 160-162), are not duplicated in this Joint Appendix

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-8121-CIV-ROETTGER

ROBERT A. BECK, II,

Plaintiff,

v.

ROBERT M. PRUPIS, et al.

Defendants.
_____/

REPLY MEMORANDUM OF LAW OF [sic] IN SUPPORT OF DEFENDANTS' THE BELLEZZA GROUP'S MOTION FOR SUMMARY JUDGMENT

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LEGAL ARGUMENT

BECK'S RICO CLAIMS ARE LEGALLY DEFICIENT BECAUSE HIS ALLEGED INJURIES DID NOT FLOW FROM COMMISSION OF ANY RICO PREDICATE ACTS

In his RICO Case Statement, Beck delineated 50 alleged RICO predicate acts falling into the following categories: (1) 36 acts of alleged extortion and mail/wire fraud committed against contractors seeking bonds, requiring them to pay fees to CPC that Beck contends should have been insurance premiums; (2) 6 acts of alleged "looting" of SIG's Insurance Subsidiaries, by causing them to transfer funds to the parent corporation (SIG) to pay legitimate corporate debts; (3) 3 acts of alleged mail/wire fraud committed against First Fidelity Bank, which loaned SIG $7.5 million in December 1987 in reliance on allegedly false financial information; and (4) 5 alleged acts which supposedly led to his termination in May 1988.

Faced with his own deposition testimony that these alleged predicate acts were not directed at him and did not cause him any direct harm and, accordingly, with overwhelming caselaw that deprives him of RICO standing, Beck now does a complete about-face and changes his theory of the case. This turnabout is made clear by Beck's own Statement of Material Facts, which expressly concedes: "Beck does *not* seek any damages resulting from *those* [50] predicate acts. They are plead [sic] in the instant case merely to satisfy RICO's pattern requirements." Beck Facts at 5. Instead, Beck now asserts a new RICO theory that he was "fraudulently induced" to purchase his stock/debenture Unit in August 1986 based on

an alleged promise that he would be SIG's CEO forever. Yet, as Beck concedes, none of the predicate acts pleaded in his RICO Case Statement allege any racketeering activity in connection with this alleged promise. As set forth below, as a matter of law, there cannot be a RICO violation based upon this allegation.

As a separate and distinct RICO claim, Beck also tries to salvage RICO standing by claiming that false financial projections (a prediction of SIG's ***future*** financial performance) were given ***to first Fidelity*** prior to it loaning SIG $7.5 million – a loan that Beck, together with nine other SIG directors, guaranteed. But Beck's deposition confirms he did not receive or rely on this projection before signing the guaranty.

Finally, Beck concedes that his RICO claim based upon his employment termination is barred by the Eleventh Circuit decisions in *O'Malley* and *Morast*. But to circumvent this undisputed, well-settled law, he recharacterizes his claim as one of "fraudulent termination," i.e. that defendants allegedly created false causes for his termination. There is no such thing as a cause of action for "fraudulent termination." Beck had an Employment Agreement with SIG that allowed termination "for cause." If "cause" did not exist, then Beck had a common law breach of contract claim against SIG and certainly not a treble damage RICO claim against these defendants who, as SIG's directors, voted for the termination. Indeed, the Florida state court previously denied Beck's claim against these defendants that they conspired to wrongfully terminate him.

A. Beck Cannot Recover For His August 1986 Stock/Debenture Purchase

1. Beck Did Not Rely on Any Material Misrepresentations

On August 11, 1986, Beck purchased a SIG investment Unit consisting of a $150,000 debenture and $75,000 common stock, for which he now seeks RICO damages. The purchase was part of a $33 million offering predicated upon a Private Placement Memorandum (PPM) that Beck himself played a substantial role in preparing. Beck now asserts that the PPM upon which he relied in purchasing his investment represented he would be CEO forever. But it says no such thing. At page 42, the PPM simply listed the *current* officers and directors of SIG and stated that Beck was "then" President and CEO. Beck Exh. 11. In no way did the PPM say that Beck would *continue* as CEO. Indeed it cold not, since Section 4.2 of SIG's Bylaws gave the Board complete discretion to remove any officer at any time. Therefore, there was no misrepresentations in the PPM upon which to base a RICO mail fraud claim. *See Arango v. Guzman Travel Advisors*, 761 F.2d 1527 (11th Cir. 1985) (no fraud where written document did not purport to promise anything to plaintiff); *Kramer v. Unitas*, 831 F.2d 994 (11th Cir. 1987).

What makes Beck's allegation even stranger is that in June 1986, two months *before* he purchased his Unit, he signed a five-year Employment Agreement with SIG that gave him the title of President but said nothing about him being CEO. Hartmann Reply Cert., Exh. A. Beck conceded that nothing in his Employment Agreement obligated SIG to keep him as CEO. *Id.*, Exh. B. Beck cannot

assert that promises were made to perpetually title him as CEO when such allegations directly contradict the express terms of his Employment Agreement. *See Longnecker v. Ore Sorters (North Amer.), Inc.*, 634 F. Supp. 1077 (N.D. Ga. 1986) (employee's fraud claim dismissed because representations conflicted with written employment contract); *Jankovich v. Bowen*, 844 F. Supp. 743 (S.D. Fla. 1994) (same); *Smith v. Mellon Bank*, 957 F.2d 856 (11th Cir. 1992); *Chris Berg, Inc. v. Acme Mining Co.*, 893 F.2d 1235 (11th Cir. 1990). Moreover, Beck's brief cites nothing in the record to prove oral representations by anyone to perpetually title him as CEO.

Moreover, Beck was represented by counsel who negotiated his employment contract. If the CEO title was so important, his counsel could easily have negotiated an appropriate provision, which was not done. Indeed, Beck testified that after learning he was no longer CEO, he consciously decided to remain with SIG, believing he "had a great opportunity" with a company he thought had a promising future. Reply Cert., Exh. B. Therefore, Beck cannot claim that remaining as CEO was important when, for almost two years after the title was removed, he did nothing to rescind his stock/debenture purchase, opting instead to remain as President and collect his $135,000 annual salary. *See Basic Inc. v. Levinson*, 488 U.S. 223, 108 S. Ct. 978 (1988).

2. There Were no RICO Predicate Acts Inducing Beck to Purchase His Unit

It is well-settled that RICO damages are not recoverable unless they flow directly from commission of

predicate acts of racketeering. *Sedima v. Imrex Co.*, 473 U.S. 479, 496-97, 105 S.Ct. 3275, 3285 (1985). Beck simply has not shown that defendants committed any RICO predicate acts with respect to his claim that he was to be CEO forever. Beck's brief alleges that, "both orally and in writing, *through the mails*, that he would continue to be Chief Executive Officer of SIG after the offering." Beck Statement of Material Facts at 7 (emphasis added). But missing from this assertion is any citation to the record (other than the previously discussed PPM), and we are left to guess what mailing he is referring to as the basis for the conjured claim. A RICO plaintiff simply cannot base a mail/wire fraud claim on unsupported assertions of counsel in a brief, especially since the record is devoid of any deceptive use of mails or wires regarding the CEO allegation. *See In re Cascade Intern. Sec. Lit.*, 840 F. Supp. 1558, 1582-83 (S.D. Fla. 1993).

In the absence of RICO predicate acts, Beck is left at best with a common law misrepresentation claim, which does not support a treble damage RICO claim. Such common law tort claims cannot be swept under the RICO umbrella since, in enacting RICO, Congress certainly did not intend to federalize state tort law by permitting RICO plaintiffs to recover treble damages for non-criminal fraudulent acts. *Willis v. Lipton*, 947 F.2d 998, 1001 (1st Cir. 1991); *Haroco v. American Nat. Bank and Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 105 S. Ct. 3291 (1985); *Nodine v. Textron, Inc.*, 819 F.2d 347, 349 (1st Cir. 1987).

3. Beck's Injuries Were Not Caused By Defendants' Alleged Misrepresentations

The Supreme Court has held that for a plaintiff to have RICO standing, his damages must have been both actually and proximately caused by the predicate acts of racketeering. Thus a threshold requirement is that the defendants' acts be the actual or "but for" cause of plaintiff's damages. *Holmes v. Security Inv. Protection Corp.*, 112 S.Ct. 1311, 1317-18 (1992). It is obvious from Beck's pleadings and depositions that his injuries were not caused by the alleged promise to keep Beck as CEO forever. Beck has repeatedly stated that SIG's practices of "extorting contractors" and "looting" SIG's Subsidiaries led to SIG's demise and the loss of his investment unit. *See* Bellezza Group Statement of Material Facts at 9-14. Beck thus concedes, as he must, that the predicate acts pleaded in his RICO Case Statement, practiced *upon SIG and its Subsidiaries* – not the alleged promise he would forever be CEO – led to his investment loss.

Beck may have the temerity to claim he could have prevented SIG's demise had he remained CEO. Such a claim, however, is much too speculative to be given any credence under *Holmes*. Moreover, Beck was President and a SIG director through May 1988. He was in charge of SIG's financial affairs. As such, there was nothing to prevent him from stopping the alleged illegal practices he contends caused SIG's demise. Indeed, at page 16 of his brief, Beck boasts that as President, he prevented the alleged theft of $2 million, i.e., a transfer of funds from the subsidiary to SIG. Therefore, not having the CEO title did not prevent him from acting.

4. Beck Has Not Proven a Pattern of Racketeering Activity

Beck alleges that defendants, by (mis)representing to him his CEO status, conducted or conspired to conduct the affairs of SIG through a pattern of racketeering activity, in violation of Sections 1962(c) and (d). This claim clearly does not meet the 'pattern of racketeering" requirement of Section 1961(5). As Beck conceded, the predicate acts pleaded in his RICO Case Statement were directed against third parties and NOT against him. But Beck mistakenly believes that he can attach himself like a parasite to the RICO pattern pled against those third parties, by alleging injury from wholly *separate* acts of common law fraud. Beck, however, cannot establish a pattern of racketeering by latching onto predicate acts targeting and directly injuring third parties. *Vild v. Visconsi*, 956 F.2d 560, 567 (6th Cir. 1992). Rather, he himself must have been the target of the predicate acts of mail/wire fraud. *Pelletier v. Zweifel*, 921 F.2d 1465, 1499 (11th Cir. 1991); *Kingston Square Tenants Ass'n v. Tuskegee Gardens*, 792 F. Supp. 1566, 1578 (S.D. Fla. 1992).

The question then becomes whether the *single act* of alleged misrepresentation regarding his CEO status meets the "pattern" requirement. It clearly does not.[1] 18 U.S.C. § 1961(5) defines pattern to include "at least two acts of racketeering activity." The Supreme Court interpreted

[1] Of course, since Beck has not even proven any predicate acts in connection with the private offering, it goes without saying that there is no pattern. But for purposes of this subsection only, it is assumed *arguendo* that there was a predicate act.

Section 1961(5) to require that the predicate acts must be both related and continuous. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237-38, 109 S. Ct. 2893, 2899-2900 (1989). To establish continuity, Beck must prove either a "closed-ended" pattern or an "open-ended" pattern. A closed-ended pattern is a series of related predicate acts extending over a "substantial period of time." Predicate acts occurring within a period of weeks or months will not suffice. An open-ended pattern is one that poses a threat of continued criminal activity of the same nature. *Id.* at 241-42.

Here, Beck's claim simply is that he was defrauded when purchasing his investment unit by the alleged false promise of being CEO perpetually. This does not satisfy the "pattern" requirement. This "close ended" alleged fraud occurred only once and in a short period of time, and therefore it cannot comprise a "pattern." *H.J., Inc.*, 492 U.S. at 241-42, 109 S.Ct. at 2902 (pattern not established by predicate acts lasting only a few weeks or months); *see Sheftelman v. Jones*, 636 F. Supp. 263, 268 (N.D. Ga. 1986); *Webb v. Primo's, Inc.*, 706 F. Supp. 863, 871 (N.D. Ga. 1988); *Hutchinson v. Wickes Companies, Inc.*, 726 F. Supp. 1315, 1320 (N.D. Ga. 1989); *Aldridge v. Lily-Tulip, Inc.*, 953 F.2d 587, 594 (11th Cir. 1992); *Downing v. Halliburton & Assocs.*, 812 F. Supp. 1175, 1182 (M.D. Ala. 1993); *In re Fairchild Industries ERISA Lit.*, 768 F. Supp. 1528, 1537 (N.D. Fla. 1990).

B. Beck Cannot Recover For the First Fidelity Guaranty

As a matter of law, Beck's RICO claim regarding the guaranty must fail, because on the facts of this case attorneys fees are not compensable RICO damages. Legal fees are not recoverable under RICO where they were incurred only incidentally or were too remote from the predicate acts. *See Miller Hydro Group v. Popovitch*, 851 F. Supp. 7, 13-14 n.6 (D. Me. 1994); *Lemelson v. Wang Labs.*, Inc., 874 F. Supp. 430, 433 (D. Mass. 1994).[2] Here, Beck's legal fees were not even caused by RICO predicate acts; they were caused by alleged common law fraud of allegedly inducing Beck to sign the Guaranty. Beck has not alleged or proven that he relied on any mailings in signing the guaranty.

In any event, the fees were expended only indirectly and only after several contingencies occurred: first, SIG defaulted on the corporate note; second, SIG declared bankruptcy, preventing First Fidelity from collecting against the direct obligor; then First Fidelity sued the guarantors, and then Beck asserted a malpractice claim against L2P2. Most importantly, unlike the cases cited by Beck,[3] the defendants here did not use litigation specifically as an element of their alleged scheme to defraud,

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[2] *See, e.g., Local 355 v. Pier 66 Co.*, 599 F. Supp. 761, 765 (S.D. Fla. 1984); *Willis v. Lipton*, 947 F.2d 998, 1000-01 (1st Cir. 1991); *Rylewitz v. Beaton Services*, 698 F. Supp. 1391 (N.D. Ill. 1988), *aff'd*, 888 F.2d 1175 (7th Cir. 1989); *Mendelovitz v. Vosicky*, 40 F.3d 182 (7th Cir. 1994).

[3] *See e.g., Stochastic Decisions v. DiDomenico*, 995 F.2d 1158 (2d Cir. 1993) (predicate acts of bankruptcy fraud were specifically geared to avoid debt collection, thus directly

nor were legal fees an "intended consequence" of their acts. *Miller Hydro*, 851 F. Supp. at 13-14 n.6. They merely asked Beck to sign a contract. Therefore, Beck's legal fees were not the direct result of the alleged RICO violations and are not compensable.

Even if legal fees can be recovered under RICO, Beck's fraud claim is groundless. At pages 9-13 of his Statement of Material Facts, Beck alleges that he was fraudulently induced to guaranty a $7.5 million loan from First Fidelity Bank to SIG. The alleged fraudulent inducements consist of the following: (1) the use of false financial information, primarily regarding the Chief Structures situation; (2) concealment of CPC's practice of charging contractors prequalification and monitoring fees; and (3) a promise of continued employment. For the same legal reason set forth at pages 5 and 6 herein, these claims do not meet *H.J., Inc.'s* "pattern" requirement. Simply stated, even assuming these allegations amount to predicate acts, they occurred within a lightning fast period of time – one day – and not over a long period of time. Beck was asked – and agreed – to sign the Guaranty at a single December 1987 Board meeting. Reply Cert., Exh. C. Since the alleged fraud began and ended when Beck was asked and agreed to sign the Guaranty on one day in December 1987, there can be no "pattern" of racketeering.

Making this claim even more egregious is the fact that Beck does not cite anything in the record to show

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causing plaintiff to incur recoverable attorneys fees); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988) (plaintiff forced by predicate acts to defend frivolous lawsuits geared to avoid debt collection).

that he received any financial statements or projections before agreeing to sign the Guaranty. The *only* financial projection Beck points to was given to First Fidelity *only*, and was prepared, not by the Bellezza Group, but by SIG's financial department.[4] And Beck testified he did not receive this projection prior to signing the guaranty. Reply Cert., Exh. D. Clearly, Beck could not have relied on a document he did not know existed when he signed the Guaranty.[5]

Beck claims that he was unaware of the circumstances concerning Chief Structures. This assertion, however, is belied by Beck's own deposition testimony. Beck testified that before signing the Guaranty, he was aware: (1) that Chief was having financial difficulties; (2) that SIG was advancing money to Chief to help it complete its projects; (3) that the advances were being treated by SIG as "workouts"; (4) that the advances were part of a joint venture arrangement with Chief and SIG (or its subsidiary), since Beck himself signed SIG checks to Chief totalling hundreds of thousands of dollars containing the notations "joint venture" and "workout", Reply Cert.,

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[4] Beck has no evidence that the Bellezza Group falsified SIG's financial records. Indeed, it was Beck and other financial officers who were responsible for maintaining SIG's financial records and preparing its financial statements. Moreover, the statutory financial statements in existence before he signed the guaranty were certified by Beck himself, under penalty of perjury, as being accurate. Reply Cert., Exh. E. It is inconceivable how Beck can allege fraud when he supposedly relied on financial documents he himself prepared and signed.

[5] Moreover, projections of future financial performance clearly cannot be the basis of a fraud claim. *Royal Typewriter Co. v. Xerographic Supplies*, 719 F.2d 1092, 1105-06 (11th Cir. 1983).

Exh. F; and (5) that the advances to Chief could result in claims and that this would be a decision to be made by SIG's auditors. *See* Bellezza Group Statement of Material Facts at 16-17. In short, when a contracting party such as Beck possesses the substantial amount of knowledge in December 1987 that Beck *admits* he had, he cannot later claim fraud when he chooses to accept the risk. *Pelletier*, 921 F.2d at 1506-10; *see* cases cited in Bellezza Group Memorandum of Law at 11.

C. Beck Cannot Recover Damages for Loss of Employment

Beck argues that this court should follow the out of Circuit decisions in *Schiffels* and *Shearin*, which held that a terminated employee has standing to sue for a RICO conspiracy upon his discharge. But, the law in the Eleventh Circuit, under *O'Malley* and *Morast*, is to the contrary.[6] Most Courts agree that in a conspiracy case, a RICO plaintiff must have been injured by predicate acts, since RICO only targets criminal acts of racketeering. *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir. 1993); *Hecht v. Commerce Clearing House*, 897 F.2d 21,

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[6] The distinction Beck draws in footnote 10 of his Memorandum of Law, between an employee reporting conduct, and merely refusing to participate in that conduct, is meaningless. *O'Malley* expressly abrogated that distinction, which *Morast* had merely suggested in dictum. *O'Malley*, 887 F.2d at 1561. Moreover, the point of the whistleblower standing cases is that the plaintiff cannot recover because the predicate acts did not cause the injury, and this would be the case regardless of whether plaintiff "reported" or "refused to participate."

25 (2d Cir. 1990); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 48 (1st Cir. 1991); *Reddy v. Litton Industries*, 912 F.2d 291, 295 (9th Cir. 1990).[7]

D. Beck Cannot Recover for Failure to Sell Stock

Beck's [sic] argues that he can recover for his failure to sell stock. Beck Memorandum of Law at 16. But as every single court to consider the issue has held, Beck's "failure to sell" claim is simply another way of alleging diminution in value of stock, since ALL shareholders – not just Beck – were deprived of allegedly negative information about SIG. Therefore, the courts unanimously hold that a "failure to sell" claim is a derivative claim for which the stockholder does not have RICO standing. *See Crocker v. FDIC*, 826 F.2d 347, 350 (5th Cir. 1987); *Leach v. FDIC*, 860 F.2d 1266, 1273-74 (5th Cir. 1988); *Arent v. Distribution Sciences, Inc.*, 975 F.2d 1370, 1372-73 (8th Cir. 1992); *Chanoff v. U.S. Surgical Corp.*, 857 F. Supp. 1011, 1018, 1025 (D. Conn. 1994); *Schautteet v. Chester State Bank*, 707 F. Supp. 885, 890 (E.D. Tex. 1988). Moreover, had Beck alone received the information he claims was concealed

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[7] It goes without saying that Beck's termination, which began and ended in May 1988, does not constitute a pattern of racketeering activity under *H.J., Inc.* Moreover, the three acts of alleged fraud – the August 1986 stock/debenture purchase, the December 1987 guaranty, and Beck's May 1988 termination – cannot, combined, form a RICO pattern. Beck cannot establish "relatedness" merely by alleging different types of damages resulting from separate and distinct transactions having different purposes. *See Vild v. Visconsi*, 956 F.2d 560, 565-67 (6th Cir. 1992); *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 44-45 (1st Cir. 1991); *Hartz v. Freidman*, 919 F.2d 469, 474 (7th Cir. 1990).

from him, and then sold his stock for a profit prior to public disclosure, his profit would have resulted from unlawful insider trading. It is simply too much to ask to recognize an injury based on lost profit to which no one was lawfully entitled. *Crocker*, 826 F.2d at 351 n.6; *Arent*, 975 F.2d at 1374; *Chanoff*, 857 F. Supp. at 1018.

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DATED: April 26, 1995

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered to Jay Starkman, Esq., Starkman & Magolnick, P.A., Museum Tower, Suite 2701, 150 West Flagler Street, Miami, Florida, and furnished by

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Order on the Bellezza Group's Motion for Summary Judgment

The full text of the Order appears in the Appendix to Petitioner, Robert A. Beck, II's, Petition for Writ of Certiorari at pages App. 23 - App. 46 and is, therefore, not duplicated in this Joint Appendix

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 95-4844

ROBERT A. BECK, II,

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vs.

RONALD M. PRUPIS, LEONARD BELLEZZA, ERNEST J. SABATO, WILLIAM PAULUS, JR., HARRY OLSTEIN, FREDERICK C. MEZEY, BYRON L. SPARBER, JOSEPH S. LITTENBERG,

Defendants, Appellees.

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STATEMENT REGARDING ORAL ARGUMENT

Because of the size of the record, the complexity of the facts, the number and complexity of the issues and the amount of the damages sought, Beck respectfully requests oral argument.

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I. STATEMENT OF JURISDICTION

The judgment appealed from is a final judgment that disposed of all of Beck's claims. Thus, the Court's jurisdiction for this appeal rests in 28 U.S.C. §1291.

II. STATEMENT OF THE ISSUES

1. Does Beck have standing to assert a RICO claim for the damages he suffered directly as a result of the defendants' fraudulently inducing him to extend a $150,000 unsecured loan to their enterprise?

2. Does Beck have standing to assert a RICO claim for the damages he suffered directly as a result of the defendants' fraudulently inducing him to personally guaranty a $7.5 million loan to their enterprise?

3. Does Beck have standing to assert a RICO conspiracy claim for the damages he suffered as a result of the defendants' termination of him, where that termination was an overt act in furtherance of the defendants' conspiracy?

4. Does Beck have standing to assert a RICO claim for the damages he suffered directly as a result of the defendants' fraudulently inducing him to purchase stock in the defendants' enterprise?

5. Does Beck have standing to assert a RICO claim for the damages he suffered directly as a result of the defendants' fraudulently inducing him to forebear from selling his stock?

6. Was it an abuse of discretion for the District Court to decline jurisdiction over Beck's pendent state

law claims pursuant to 28 U.S.C. §1367, where Beck's action pre-dated the effective date of that statute and where Beck's state law claims are now barred by the applicable statute of limitations?

7. Was it an abuse of discretion for the District Court to dismiss Sparber for a failure to serve him, where Sparber's counsel filed a Notice of Appearance, participated in all pretrial events, and waited approximately four years to raise the defense, until after the statute of limitations had run?

III. STATEMENT OF THE CASE

A. Course of Proceedings and dispositions below.

On May 15, 1989, Beck filed a complaint in Florida Circuit Court, alleging a wrongful termination claim against SIG, and defamation and state RICO claims against the New Jersey Group, Sparber, Littenberg and others[1] (R5-160-EX3).

In that state action, the New Jersey Group filed a Motion to Dismiss Beck's state RICO claims, arguing that

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[1] "Beck" refers to plaintiff/appellant Robert A. Beck, II. "Bellezza" refers to defendant/appellee Leonard Bellezza. "Paulus" refers to defendant/appellee William Paulus, Jr. "The New Jersey Group" refers to defendants/appellees Bellezza, Paulus, Ernest Sabato, and Harry Olstein. "Littenberg" refers to defendant/appellee Joseph Littenberg. "Sparber" refers to defendant/appellee Byron Sparber. "The Defendant Directors" refers to all of the defendants in this action. "M&S" refers to Mandler & Silver, P.A., counsel for Littenberg and Sparber. "SIG" refers to Southeastern Insurance Group, Inc.

Beck did not have standing (R5-138-EX H). Based upon *Shearin v. E.F. Hutton*, 885 F.2d 1162 (3rd Cir. 1989), the Florida Circuit Court granted the motion as to the substantive RICO claims, but denied it as to the RICO conspiracy claims. *Id.* Beck's state RICO claims were based solely upon Beck's standing as a whistle blower, as that was the only claim in existence at the time (R5-160-EX3 at 24-34).

In or about early 1990, SIG filed for Chapter 7 bankruptcy (R5-138-EX F). At approximately the same time, the shareholders of SIG filed a derivative suit in New Jersey District Court, copying virtually all of the allegations of racketeering conduct directly from Beck's state court complaint (*Id.*). The shareholders named the same defendants as Beck's Florida Circuit Court action, with one addition – they also named Beck as a defendant (*Id*). Sparber was also named as a defendant in the shareholders' New Jersey action (*Id*). As Beck did not want to litigate the identical complex RICO issues in two separate forums, he voluntarily dismissed his RICO claim in Florida Circuit Court and, on May 5, 1990, re-alleged it as a cross-claim in New Jersey (R5-138-EX J).

Subsequently, the New Jersey District Court severed Beck's Cross-Claim and transferred it to the District Court for the Southern District of Florida (R1-1). Neither the Florida District Court nor the parties have ever been able to recover the portions of the file presumably transferred by the New Jersey District Court.

On June 21 1991, shortly after the case had been transferred to the Southern District of Florida, M&S filed *two separate* Notices of Appearance – one on behalf of

Littenberg, and the other on behalf of Sparber (R1-4; R1-5). The latter notice stated that M&S "are appearing as counsel in this cause on behalf of Defendant Byron Sparber" (R1-4). Since that time, attorneys from M&S have actively participated in this litigation, attending depositions, as well as receiving service copies of all documents filed (R1-36-3; R2-43-3; R2-44-21).

At the same time, M&S represented Sparber in at least five other actions relating to SIG, pending in Florida State Court: *Beck v. SIG, et al.*, Case No. 89-21551; *Beck v. Prupis, et al.*, Case No. 90-20978; *State of Florida, Department Of Insurance, as Receiver of Southeastern Reinsurance Co. v. Bellezza, et al.*, Case No. 91-09319; *State of Florida, Department of Insurance, as Receiver of Southeastern Reinsurance Co. v. Bellezza, et al.*, Case No. 90-49147; and *State of Florida, Department of Insurance, as Receiver of Southeastern Casualty & Indemnity Insurance Co. v. Bellezza, et al.*, Case No. 91-07334.

On November 30, 1994, Beck noticed the deposition of Sparber in this action (SR1). Shortly thereafter, for the first time, M&S argued that Sparber had not been served as a defendant and, thus, required a subpoena prior to appearing at a deposition (R2-64). Never, prior to that time, had M&S indicated that Sparber had not made an appearance as a defendant in this case.

On December 15, 1994, Sparber filed his Motion to Dismiss and Motion to Strike Notice of Appearance (R2-64). On May 3, 1995, the District Court granted the Motion, holding that Sparber had not been timely served (R6-168).

On March 30, 1995, the New Jersey Group filed its Motion for Summary Judgment (R5-136). On June 12, 1995, the District Court granted the New Jersey Group's Motion as to Beck's RICO claims, holding that Beck lacked standing to pursue those claims (R6-191 at 10-24). The District Court also dismissed Beck's pendent state law fraud and misrepresentation claims, pursuant to 28 U.S.C. § 1367(c)(3) (R6-191-24).

On July 5, 1995, Beck filed this appeal of the District Court's dismissal of Sparber as a party to this action, its grant of summary judgment on Beck's RICO claims, and its dismissal of Beck's pendent state law claims (R7-193).

B. Statement of the facts.

This is an action by Beck under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, for a pattern of racketeering activity committed by the Defendant Directors, former officers and directors of SIG (SIG also will be referred to as "the Enterprise"), by reason of which Beck has directly suffered damages (R5-160-EX1 at ¶¶1-145).

Beck's Complaint alleges that, beginning in or around the fall of 1985, the Defendant Directors devised a scheme and artifice to defraud Beck and others and, in addition, used their positions at SIG to extort potential customers (*Id.* at ¶¶11-13). As part of this scheme and artifice to defraud, the Defendant Directors fraudulently induced Beck to make an unsecured loan to the Enterprise, to purchase stock in the Enterprise and to refrain from selling that stock until it was too late, and to be a

personal guarantor on a $7.5 million loan to the Enterprise (*Id.* at ¶¶14-15, 61-78; R1-25). Moreover, when Beck became a threat to the continued racketeering conduct of the Defendant Directors, they fraudulently created causes for his termination (R5-160-EX1 at ¶¶12-13 and 43-60).

The Defendant Directors' racketeering activity included mail fraud, wire fraud and extortion, within the context of falsifying financial statements (*Id.* at ¶¶18-19 and 22), looting the Enterprise (*Id.* at ¶¶20-21, 33-35 and 37-41), extorting contractors (*Id.* at ¶¶23-30), set aside fraud (*Id.* at ¶31), fraudulent promises to indemnify (*Id.* at ¶32) and attempted options fraud (*Id.* at ¶36). Approximately 50 predicate acts are set forth in detail in the Complaint in order to fulfill RICO's pattern requirement (*Id.* at ¶¶79-128; *see also* R1-25).

1. The Criminal Conduct Committed Against Beck.

At the heart of Beck's action are the predicate acts that were committed directly against him, by which he directly suffered damages (R5-160-EX1 at ¶¶42-78). These are the predicate acts by which Beck was directly damaged and for which Beck is suing the Defendant Directors (*Id.*). There is substantial evidence supporting each of these predicate acts.

The first RICO predicate act committed by the Defendant Directors directly against Beck occurred in the summer of 1986, when the Defendant Directors fraudulently induced Beck to extend a $150,000 unsecured loan to their Enterprise and also to purchase some stock

therein (*Id.* at ¶¶74-78; R1-25-5). This fraudulent inducement was in connection with a private offering that commenced in the Spring of 1986 (R5-160-EX11). At that time, the Defendant Directors, in an effort to lure Beck into investing money in their Enterprise, purposefully hid from Beck their plans to remove Beck from his position as SIG's Chief Executive Officer ("CEO") after the private offering closed and after Beck had invested substantial sums in SIG (R5-161-EX14 at 58-59; R5-161-EX15 at 174-76; R5-161-EX16 at 24-25; R5-161-EX17 at 148-50). The Private Placement Memorandum circulated for the offering listed Beck as SIG's CEO (R5-160-EX11 at 42).

Unbeknownst to Beck, the Defendant Directors had already decided that Beck would not continue as SIG's CEO (R5-161-EX14 at 58-59). With this vital information fraudulently concealed from him, Beck extended a $150,000 unsecured loan to SIG and invested an additional $75,000 (to purchase SIG stock) (R5-161-EX12 at 113). If not for his reasonable belief that he would continue to be the CEO of the company, Beck would never have extended the loan or invested (R5-161-EX13 at 63-64).

The Private Offering closed on August 11, 1986. A meeting was held on August 18, 1986, exactly one week after the close of the offering (R5-161-EX14 at 16, 49-50). At this meeting, the Defendant Directors *"officially"* decided that Beck would no longer continue as the CEO of SIG (R5-161-EX15 at 174-76; R5-161-EX16 at 24-25; R5-161-EX17 at 148-50).

In addition, at the time, the Defendant Directors fraudulently hid from Beck some of the illegal manner in

which they were already operating their Enterprise. Specifically, the Defendant Directors fraudulently hid from Beck fraudulent representations that they had made to indemnify contractors in order to enable these contractors in which they had an interest to get bonds (R5-160-EX1 at ¶32; R1-25-6). Had Beck known of these fraudulent promises to indemnify, he would not have extended the $150,000 loan nor invested the additional $75,000 in the Enterprise (R5-160-EX9 at 31-34). The loan was never repaid and his investment was lost (R1-25 at 3-5).

Next, the Defendant Directors fraudulently induced Beck to personally guaranty a $7.5 million loan to SIG in December of 1987 (R5-160-EX1 at ¶¶74-78; R1-25 at 3-5). As part of their racketeering conduct, the Defendant Directors falsified SIG records and financial statements, resulting in a material overstatement of the value and net income of SIG and its subsidiaries (R5-160-EX1 at ¶¶18-22; R1-25 at 2-5). Beck relied on the fraudulently created financial statements and estimates in his assessment of the likelihood that SIG would be able to repay the First Fidelity loan (R5-160-EX18 at ¶2). As such, Beck was fraudulently induced to guaranty the loan (R1-25 at 3-5).

Specifically, the New Jersey Group and others caused SIG to treat claims made by Chief Structures, Inc. ("Chief") as a "workout," where claims payments made by SIG (an expense) were fraudulently portrayed as "notes receivable" (an asset) (R5-162-EX51 at 5; R5-161-EX30 at 5-6). Loss reserves for future claims payments were neither established nor reported (R5-161-EX17 at 215-18). This resulted in the fraudulent overstatement of

the financial condition of SIG by millions of dollars (R5-161-EX30 at 5-6; R5-162-EX51 at 5-6).

In the Summer of 1987, SIG was notified by Chief's owner, Steve West ("West"), that Chief would be unable to meet its obligations under construction contracts for which SIG's subsidiary ("SCI") had provided bonds (R5-161-EX19 at ¶¶6-8). This created a claim against the bonds which had been previously issued by SCI (*Id*).[2] Chief requested that SIG provide funds to keep the projects from going into default (*Id*).

Thereafter, West requested additional bonds (R5-161-EX20 at 4). Bellezza agreed to sign a general indemnity agreement to enable the new bonds to be issued by SCI (R5-161-EX21 at 91-92; R5-161-EX20 at 5). Because Bellezza's fee could not be paid directly to him from an insurance company without violating insurance laws, Construction Performance Corporation ("CPC"), a SIG non-insurance affiliate, was used as a "front" (R5-161-EX23 at 100-18). Despite his representation, Bellezza never executed this general indemnity agreement (R5-161-EX20 at 5).

Several of the Defendant Directors (including, especially, Bellezza and Paulus) drafted an agreement for West to execute. (*Id*. at 4-5; R5-161-EX17 at 102-03). This agreement provided: (1) West and Chief would form a new entity and 10% of the shares would be owned by

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[2] At this time, various members of the New Jersey Group and the Defendant Directors were either in charge of working out claims or had specific responsibilities in connection with claims and/or Chief (R5-161-EX20 at 6-7; R5-161-EX22 at 5-6).

CPC, which would elect one half of the Board of Directors; (2) CPC would provide financial guarantees to SCI in order for SCI to issue the new bonds to Chief; (3) CPC would "arrange" for funds to be loaned to Chief-FL to complete projects bonded by SCI; (4) Bonds issued prior to the agreement would be classified as Group A bonds and new bonds issued after the agreement would be classified as Group B bonds; and (5) CPC would receive 50% of the profits on all bonds in Group B, but not less than $500,000 (R5-161-EX24).

The profit participation of CPC on construction projects bonded by SCI was a requirement for the surety bonds to be issued (R5-161-EX15 at 89-90, 129, 137-40; R5-161-EX23 at 87-90; R5-162-EX50 at 2). The CPC fees were payable in addition to the premium payable to SCI (R5-161-EX23 at 112, 117-18; R5-162-EX50 at 3). These CPC fees thus constituted an illegal and excessive premium in direct violation of insurance laws (R5-161-EX23 at 100-18; R5-162-EX50 at 3-4).

West was extorted and coerced into agreeing to pay the illegal and excessive premiums to CPC (R1-25 at 12, 17, 21; R5-160-EX1 at ¶¶24, 25, 127). Furthermore, the arrangement of loans by CPC to Chief was a sham of CPC fronting for the SIG insurance subsidiaries, which actually did advance funds to Chief (R5-162-EX50 at 2-3). Such loans were, however, prohibited under Florida insurance law (R5-161-EX25 at 246-49; R5-161-EX26).

The September 10, 1987 Joint Venture Agreement was executed at a time when there were claims and losses on the bonds previously issued to Chief (the A-bonds) (R5-161-EX17 at 78-84; R5-161-EX15 at 90-93; R5-161-EX24

at 1). This agreement therefore allowed the Defendant Directors to hide the losses, and actually characterize them as an asset (R5-160-EX1 at ¶19).

Prior to the closing of the First Fidelity loan, no report had been made of any claim on the Chief bonds (R5-161-EX18 at ¶3). In fact, two Claims Summaries (R5-161-EX27 and EX28) were mailed to Beck and others at or around that time (R5-161-EX13 at 149). There was no listing of the Chief bonds in these Claims Summaries (R5-161-EX18 at ¶3C; R5-161-EX13 at 149). These Claims Summaries were also used to reflect the loss expense and loss reserve in the September 30, 1987 financial statements of SIG and its insurance company subsidiaries (R5-161-EX18 at ¶3). This information was not known by Beck when he executed the First Fidelity guaranty on December 31, 1987 (*Id.*).

The omission of the Chief claims was a material fact. The Chief claims eventually amounted to paid losses for SIG in excess of $6 million (R5-161-EX29).

Thus, through the fraudulent misrepresentations of the Defendant Directors, Beck was unaware of the following material facts when he executed the First Fidelity guaranty: (1) The September 10, 1987 Joint Venture Agreement was in existence; (2) Chief was in reality a claim and a loss to SIG; (3) The Claims Worksheets did not include a significant claim (in fact, Chief was SIG's largest claim); (4) SIG had changed its policy and was handling claims situations by issuing new bonds to defaulting contractors in the hope that they would work their way out of their claims; and (5) The SIG financial statements fraudulently overstated the value of SIG by

$3-6 million (R5-161-EX18 at ¶3). Had Beck known these facts, he would not have executed the personal guaranty (*Id.*; R1-25 at 3-5).

The New Jersey Group also fraudulently concealed information from Beck regarding the illegal manner in which SIG was operated. In early 1987, the New Jersey Group and others conspired to create a separate corporation, CPC, in order to cover up their illegal manner of operating SIG (R5-161-EX15 at 18-23; R5-161-EX23 at 105-08). CPC was established for the purpose of extorting contractors applying for surety bonds from the SIG insurance subsidiaries (*Id.*; R5-161-EX31 at 47-50; R5-160-EX1 at ¶23). This was done by forcing the contractors to pay illegal fees (from 50% to 300% of the bond premium) to CPC to qualify for surety bonds, in addition to the surety bond premium payable to the SIG insurance subsidiaries (R5-161-EX15 at 180; R5-161-EX23 at 105-08; R5-160-EX1 at ¶23; R5-162-EX50 at 3-4; R5-161-EX18 at ¶4).

Contractors seeking bonds from the SIG insurance subsidiaries were threatened (extorted) that, unless they agreed to pay these illegal fees to CPC, bonds would not be issued (R5-161-EX15 at 194; R5-161-EX32 at 86-87; R5-160-EX1 at ¶24; R5-162-EX50 at 3-4). Over one hundred contractors applying for SIG surety bonds were forced to agree to pay fees to CPC (R5-161-EX33). In most cases, the financial condition of these contractors prevented them from obtaining bonds elsewhere (R5-161-EX23 at 83, 120-21).

One example of this illegal conduct involved JJW Construction, Inc. ("JJW"). JJW, an applicant for surety insurance at SIG's insurance subsidiary, was extorted to

pay a $275,000 fee to CPC in exchange for the posting of a $500,000 letter of credit from Bellezza (R5-161-EX15 at 58-59; R5-161-EX32 at 42-45, 75-76; R5-161-EX34 at 126-30; R5-161-EX25 at 84-86, 336 and 343; R5-161-EX35; R5-161-EX18 at ¶4; R5-161-EX30 at 4; R5-160-EX1 at ¶¶24-25, 97-105).

To prevent their illegal operation of SIG from being exposed, the Defendant Directors conspired to fraudulently conceal CPC's operations from Beck (R5-161-EX15 at 12-17; R5-161-EX21 at 57-58; R5-161-EX25 at 84-86, 336, 338). Thus, as a result of the fraudulent misrepresentations by the Defendant Directors, Beck was unaware of the following material facts when he executed the First Fidelity guaranty: (1) Contractors were being extorted to execute agreements with CPC as a condition to obtain bonds; (2) JJW had agreed to pay a $275,000 fee, in addition to the bond premium, to obtain bonds; and (3) CPC was charging fees in excess of the premiums allowed under Florida law (R5-161-EX18 at ¶4). Had Beck known of these facts, he would not have guaranteed the December 31, 1987 First Fidelity loan to SIG (*Id.*).

In order to further induce Beck to execute the guaranty, the Defendant Directors also fraudulently concealed from Beck their plans to terminate him from his position as president of SIG (R1-25 at 3-5). Prior to Beck's execution of the First Fidelity guaranty, the Defendant Directors had already conspired to remove his responsibilities and duties, and to eventually remove Beck from office, all in order to facilitate their illegal conduct (R5-160-EX1 at ¶66). In early December of 1987, some of the Defendant Directors met and discussed Beck's termination (R5-161-EX20 at 9). These plans to terminate Beck were known by

all of the SIG directors, other than Beck (*Id.*; R5-161-EX18 at ¶5). In fact, at this time, the plans to terminate Beck were known throughout SIG (R5-162-EX36 at 26-30, 104-06). By eliminating Beck from the "information loop," however, the Defendant Directors were able to hide this information from Beck, until after his termination, which occurred five (5) months after his execution of the guaranty (R5-161-EX20 at 9; R5-161-EX18 at ¶5; R5-162-EX36 at 26-36, 39, 104-106, 129-30; R5-161-EX16 at 32-35; R5-162-EX37 at 24, 36-7; R5-162-EX38 at 7-10).

Thus, as a result of the fraudulent misrepresentations and concealment by the Defendant Directors, Beck was unaware of the material fact that the Defendant Directors had plans to terminate him (R5-161-EX18 at ¶7; R1-25 at 3-5). Had Beck known of the plans to terminate him, he would not have executed the guaranty (*Id.*). After SIG's bankruptcy, First Fidelity Bank filed suit against Beck, where he incurred substantial fees (R1-25-11; *First Fidelity Bank v. SIG, Beck, et al.*, Case No. ESX-L-018026-89 (N.J.)).

The Defendant Directors made fraudulent misrepresentations to Beck that caused him to retain and forebear from selling his holdings of SIG stock. Beginning in the spring of 1987, Beck considered selling this stock (R5-160-EX10 at 273-75). However, because of the fraudulent financial statements, the fraudulent concealment of the illegal manner in which the Defendant Directors were operating SIG and the fraudulent misrepresentations about the plans to terminate Beck, Beck did not sell the stock. Had Beck known these things, he would have sold the stock before it was too late (*Id.*; R5-160-EX9 at 53-58).

Pursuant to their racketeering conspiracy, the Defendant Directors purposely kept Beck out of the information loop at SIG (R5-162-EX36 at 26-36, 39, 104-106, 129-30; R5-161-EX16 at 32-35; R5-162-EX37 at 24, 36-37; R5-162-EX38 at 7-10). In fact, SIG employees were specifically instructed to withhold essential information from Beck (*Id.*; R5-162-EX39 at 23-25).

Nevertheless, in the Spring of 1988, Beck began to discover some of the illegal conduct. He prevented the theft of over $2 million from SIG's Florida insurance subsidiaries (R5-162-EX40 at 66; R5-161-EX12 at 172-73).[3] In addition, Beck contacted SIG's regulators and advised them that he had come to believe that the company's financial statements may have been overstated (R5-162-EX41 at 6-7, 19; R5-161-EX12 at 154-58).

Seeing Beck as a threat to their continued criminal conduct, the Defendant Directors embarked on a scheme to fraudulently create causes to terminate Beck (R5-162-EX36 at 26-36, 39, 104-06, 129-30; R5-162-EX39 at 23-25, 42-46; R5-162-EX42 at 15-16, 71-73; R5-162-EX43 at 80-85; R5-161-EX12 at 171-73; R1-25-3). Through a series of secret meetings from which Beck was excluded, the New Jersey Group and the other Defendant Directors hatched their conspiracy with Firemark Consultants, Inc. ("Firemark"), a consulting company (R1-25-11), Firemark's chairman confessed that Firemark fabricated things about Beck and recommended his termination because the president of Firemark wanted Beck's job (R5-162-EX44 at

[3] As more fully detailed, *infra* at 17-18, after Beck's termination, the Defendant Directors proceeded to commit this theft.

17-18). Firemark also fabricated documents to substantiate its recommendation to terminate Beck (*Id.*; R5-162-EX47 at 42-43). On May 13, 1988, the Defendant Directors and Firemark did, in fact, terminate Beck (R5-160-EX1 at 12-17). As part of Firemark's reward for its participation, the Defendant Directors gave Firemark's president Beck's job (R5-161-EX16 at 80-81; R5-162-EX48 at 372-73).

Thus, by reason of the Defendant Directors' racketeering conduct, Beck was directly damaged as follows: 1) he was fraudulently induced to purchase SIG stock and otherwise invest in the Defendant Directors' Enterprise; 2) he was fraudulently induced to forebear from selling his stock; 3) he was fraudulently induced to personally guaranty a $7.5 million loan to the Defendant Directors' Enterprise; and 4) he was terminated for fraudulently created causes as a result of his threat to the Defendant Directors' continuing criminal conduct.

2. The Criminal Conduct Committed Against Others.

In addition to the above-described predicate acts committed against Beck, there is also substantial evidence of predicate acts committed by the Defendant Directors against other victims, all of which form the *pattern* of racketeering conduct.

First, hundreds of contractors were extorted (R5-161-EX15 at 34-35, 58-61, 180, 202-05; R5-161-EX34 at 127-28; R5-161-EX25 at 100-01, 336, 344; R5-161-EX23 at 103).

Additionally, the Defendant Directors looted SIG and its subsidiaries (R5-160-EX1 at ¶¶20-22; R5-162-EX51 at

11-12; R1-25-2). For example, after Beck's termination, $2.5 million of policyholder surplus was stolen from SIG's subsidiaries and transferred to Bellezza, Olstein and others (R5-162-EX50 at 5-7; R5-162-EX51 at 9-12; R5-162-EX40 at 66-68). $4 million of policyholder surplus was stolen from SIG's subsidiaries and transferred to First Fidelity Bank (R5-162-EX50 at 6-7; R5-162-EX51 at 3, 11-12). Substantial funds also were taken improperly from one of SIG's subsidiaries by the back-dating of a reinsurance pooling agreement (R5-162-EX50 at 5; R5-162-EX51 at 7-8). $3.6 million of surplus interest was paid to SIG and used primarily to fund debenture-holder payments (the vast majority of which were paid to the Defendant Directors), while this money should have been paid to other parties (R5-162-EX51 at 8; R5-162-EX52 at 27, 64; R5-162-EX53 at 161-68; R5-160-EX4; R5-160-EX5; R5-160-EX6).

Moreover, the fraudulent financial statements created by the Defendant Directors were not only used to victimize Beck. In addition, these fraudulent financial statements were mailed to regulators, shareholders and creditors (R5-162-EX53 at 182-83; R5-162-EX43 at 25-26, 153-57, 182; R1-25-2).

The Defendant Directors also made fraudulent promises to indemnify SIG's insurance company subsidiaries so that bonds could be written to contractors in which the Defendant Directors had some interest. *See supra* at 7-11. A further example of this fraudulent conduct involves Aldrich Construction Co. (R5-162-EX54 at 2; R5-161-EX20 at 2-3; R5-161-EX34 at 98-115; R1-25 at 5-6).

C. Statement of the standards of review.

The District Court's entry of summary judgment on Beck's RICO claims is reviewed under a *de novo* standard. *Rice v. Branigar Organization, Inc.*, 922 F.2d 788, 790 (11th Cir. 1991); *Thrasher v. State Farm Fire & Casualty Ins. Co.*, 734 F.2d 637, 638 (11th Cir. 1984). Thus, on appeal, the appellate court applies the same standards for summary judgment as does the district court in initially ruling on the motion. *See Buxton v. City of Plant City, Florida*, 871 F.2d 1037, 1040 (11th Cir. 1989); *Thrasher*, 734 F.2d at 638.

On any motion for summary judgment, the burden of establishing the absence of a genuine issue of fact is on the movant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Griffin v. Kraft General Foods, Inc.*, 62 F.3d 368, 371 (11th Cir. 1995). The court must view the evidence in a light most favorable to the non-moving party and indulge every reasonable inference from the facts in his favor. *Harris v. Ostrout*, 65 F.3d 912, 915 (11th Cir. 1995); *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir. 1987). There must be *no* genuine issue as to *any* material fact. *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 458 (11th Cir. 1994). Before summary judgment is granted, "the facts and inferences [must] point so strongly and overwhelmingly in favor of one party, that the Court believes that reasonable men could not arrive at a contrary verdict. . . ." *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969).

The District Court's dismissals of Beck's claims against Sparber and Beck's pendent state law claims are reviewed under an abuse of discretion standard. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Rice*, 922

F.2d at 792; *Tinker v. DeMaria Porsche-Audi, Inc.*, 632 F.2d 520, 523 (5th Cir. 1980).

IV. SUMMARY OF THE ARGUMENT

Beck has asserted civil RICO claims in various capacities. As Beck directly suffered damages for each of these claims, he has standing to assert them. Therefore, the District Court erred in entering summary judgment against him.

First, Beck was fraudulently induced to extend an unsecured loan that was never repaid to the Defendant Directors' enterprise by misrepresentations made by the Defendant Directors to Beck relating to Beck's office and the Defendant Directors' illegal conduct. As such, Beck's injury flowed from the fraudulent conduct that induced him to make the loan, not the general diminution in the assets of the company. He was directly injured by the Defendant Directors' RICO conduct. His injury is not derivative, but rather, it is distinct from that of general creditors whose loss was due solely to the bankruptcy of the enterprise.

Next, Beck was fraudulently induced to personally guaranty a $7.5 million loan to the Defendant Directors' enterprise by misrepresentations made by the Defendant Directors to Beck relating to the value of the company, illegal conduct at the company, and plans to terminate Beck. Again, as this Circuit has already held, a plaintiff has standing to assert a RICO claim for the damages suffered by virtue of this fraudulent inducement, as he directly suffers injuries by virtue of the defendants' RICO conduct.

Further, Beck was terminated as an overt act in furtherance of the Defendant Directors' RICO conspiracy so that the Defendant Directors could continue their criminal conduct. While there is some split in authority, the weight of law from other Circuits, the language of the RICO statute, traditional conspiracy jurisprudence and public policy all support the proposition that such a terminated whistle blower should be given standing to assert a RICO *conspiracy* claim. While it is unclear, it appears that this Circuit has not yet expressly dealt with the issue of the standing of a person in this situation to assert a RICO conspiracy claim.

Beck was also fraudulently induced to purchase stock in the Defendant Directors' enterprise. Once again, Beck's injuries are direct, flowing from the fraudulent conduct that was targeted at Beck, not from the subsequent diminution in the value of the company. Moreover, Beck was fraudulently induced to forebear from selling his stock. Given that he had business relationships with the Defendant Directors and that he was their co-director, the Defendant Directors owed Beck a duty separate from that owed to other shareholders. The fraudulent misrepresentations that caused Beck to fail to sell his stock until it was too late caused an injury directly to Beck for which he has standing to sue.

The District Court also dismissed Beck's pendent state law claims pursuant to 28 U.S.C. § 1367. This statute, however, is not applicable to Beck's claims, as Beck's action pre-dated its effective date. Under the applicable common law, it was an abuse of discretion to decline jurisdiction over Beck's state claims, as the statute of limitations on those claims has passed.

Last, the District Court dismissed Beck's claims against Sparber due to a failure to serve him. After this action was transferred to Florida, however, Sparber's counsel filed and served a Notice of Appearance on Sparber's behalf. Sparber's counsel then participated in all pretrial activities. Approximately four years later, after the statute of limitations had passed, Sparber first raised his service defense. Given these facts (which should constitute waiver of the defense), it was an abuse of discretion to grant Sparber's motion.

V. ARGUMENT

A. Background standing law.

Under 18 U.S.C. § 1964(c), a plaintiff can assert a civil RICO claim if "he has been injured in his business or property by the conduct constituting the violation." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Thus, in order to have standing to assert a civil RICO claim, a plaintiff must show: (1) that section 1962 has been violated, (2) that an injury has occurred to the plaintiffs' business or property and (3) that the violation caused the injury. *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir.), *modified*, 30 F.3d 1347 (11th Cir. 1994).

The causation element of RICO's standing criteria requires RICO plaintiffs to prove proximate causation before they are permitted to recover. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). This requirement entails applying "[c]ausation principles generally applicable to tort liability" to RICO cases. *Cox*, 17 F.3d at

1399. A proximate cause, however, is not the same thing as a sole cause. *Id.* The test for proximate causation is whether the defendant's actions are "a substantial factor in the sequence of responsible causation," and whether "the injury is reasonably foreseeable or anticipated as a natural consequence." *Id.*; *Standardbred Owners Assn v. Roosevelt Raceway*, 985 F.2d 102, 104 (2d Cir. 1993).

The predicate acts alleged by Beck include mail and wire fraud, 18 U.S.C. §§1341 and 1343. Mail or wire fraud occurs when a person intentionally participates in a scheme to defraud another of money or property, and uses (or knowingly causes another to use) the mails or wires in furtherance of that scheme. *United States v. Downs*, 870 F.2d 613, 615 (11th Cir. 1989). One "knowingly causes" another to use the mails or wires "[w]here one does an act with knowledge that [their] use will normally follow in the ordinary course of business, or where such can reasonably be foreseen, even though not actually intended. . . . " *Pereira v. United States*, 347 U.S. 1, 8-9, (1954) (citations omitted); *see also Downs*, 870 F.2d at 615. Accordingly, knowing participants in a scheme to defraud are legally liable for their co-schemers' use of the mails or wires in furtherance of that scheme. *United States v. Lothian*, 976 F.2d 1257, 1263 (9th Cir. 1992); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1354 (5th Cir. 1984). Such participants are also liable when innocent parties or even victims make use of the mails or wires as a result of the scheme. *See Schmuck v. United States*, 489 U.S. 705, 711-12 (1989).

The "in furtherance" component of mail and wire fraud is "to be broadly read and applied." *United States v. Draiman*, 784 F.2d 248, 251 (7th Cir. 1986). Thus, it is not

necessary that the scheme contemplate the use of the mails as an essential element. *United States v. Maze*, 414 U.S. 395, 400 (1974). It is sufficient that the mailing caused is a "part of the execution of the fraud," *Kann v. United States*, 323 U.S. 88, 95 (1944), or is "incident to an essential part of the scheme," *Pereira*, 347 U.S. at 8, or is "a step in the plot." *United States v. Hollis*, 971 F.2d 1441, 1448 (10th Cir 1992) (citations omitted). The mailing or wire communication itself need not be fraudulent in nature nor is it necessary that the communication "contributed directly to the duping" of the intended victims. *Schmuck*, 489 U.S. at 712.

For a plaintiff to recover under RICO for mail or wire fraud damages, he must show that he was a target of the scheme to defraud and must have relied to his detriment on misrepresentations or material omissions made in furtherance of that scheme. *Pelletier v. Zweifel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991), *cert. denied*, ___ U.S. ___, 114 S.Ct. 311 (1993).

B. Beck's claim for fraudulent inducement to extend a $150,000 loan to SIG.

Beck's damages relating to the $150,000 loan that he was fraudulently induced to extend were proximately caused by the Defendant Directors' RICO violations, and were suffered by Beck directly, not derivatively. This claim is based upon the predicate acts of mail and wire fraud. Beck has introduced evidence from which a jury could find that the Defendant Directors are responsible for committing these predicate acts against him. *See supra* at 6-8.

In its Order granting Summary Judgment, the District Court found that Beck did not produce any evidence of the Defendant Directors making *affirmative* representations to Beck promising him that he would remain as SIG's CEO (R6-191 at 16-17). This finding ignores the evidence. *See, e.g.*, R5-160 at 42 and 44. Regardless, such a showing is not required. It is well-settled that nondisclosure of a material fact with intent to create a false or fraudulent misrepresentation is sufficient to constitute mail or wire fraud, RICO predicate acts. *Pelletier*, 921 F.2d at 1508; *Houben v. Harmon*, 605 F.2d 920, 924 (5th Cir. 1979) (affirmative duty to disclose exists where the facts are solely within the knowledge of the defendants or where some trick or artifice has been employed to thwart independent investigation); *United States v. DeCastris*, 798 F.2d 261, 263 (7th Cir. 1986) ("Concealing information known to be pertinent to a proper decision may be a fraudulent scheme" under the mail fraud statute); *United States v. O'Boyle*, 680 F.2d 34, 36 (6th Cir. 1982) (a false or fraudulent representation "may be made by statements of half truths or the concealment of material facts, as well as by affirmative statements or acts."); *United States v. Allen*, 554 F.2d 398, 410 (10th Cir. 1977) (same); *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979) (same); *Pulte Home Corp. v. Ply Gem Industries, Inc.*, 804 F.Supp. 1471, 1483 (M.D. Fla. 1992) (fraud may arise from circumstances which indicate concealment or nondisclosure of a material fact where the victim does not have equal access to the information).

The evidence presented by Beck, at minimum, raises a jury question on this issue. To further their fraudulent scheme, the Defendant Directors intentionally hid from

Beck the material fact that they intended to remove Beck from his role as CEO of SIG immediately after the closing of the Private Placement Offering. *See supra* at 6-7. In addition, the Defendant Directors fraudulently concealed their illegal conduct from Beck. *Id.* at 7-8. As a result of these fraudulent misrepresentations, Beck was induced into making the unsecured $150,000 loan. *Id.* at 6-8.

Contrary to the District Court's holding, this RICO injury suffered by Beck is not derivative – it is sufficient to establish RICO standing. Illustrative of this point is this Court's decision in *Warner v. Alexander Grant & Co.*, 828 F.2d 1528 (11th Cir. 1987). *Warner* arose out of the collapse of ESM Governmental Securities, Inc. and its corporate affiliates ("ESM"). *Id.* at 1529. Warner alleged that he was directly injured when he made $18 million in capital contributions as a result of false and misleading information contained in ESM's financial statements prepared by Alexander Grant & Co. ("Grant"), ESM's auditor. *Id.* at 1530-31. The district court dismissed Warner's action as derivative. This Court reversed, holding:

> Warner also appears to allege that as a result of the Grant financial statements, he was a direct participant in a "down stream merger" between Home State and Home State Financial in which he was required to contribute $18 million in real property to the capital of Home State. . . . If this contribution occurred as a result of the Grant statements directed to Warner personally, any injuries arising therefrom were suffered by Warner personally, not derivatively.

Id. at 1531.

Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989), is also on point. In *Ashland Oil*, the plaintiffs alleged a fraudulent scheme in which the defendants, the Arnetts, employed false financial statements to induce Ashland Oil to advance Arnett Oil large quantities of petroleum products on credit. *Id.* at 1272-73. The Arnetts then looted Arnett Oil, driving it into bankruptcy, *Id.* at 1274-75. The Arnetts raised the identical standing argument raised by the Defendant Directors and accepted by the District Court below in the instant case. The Arnetts argued that, diverting the assets of Arnett Oil, their actions injured the corporation directly and the plaintiffs only derivatively. *Id.* at 1279-80. Moreover, the Arnetts argued that only the trustee for the bankrupt Arnett Oil had standing to sue and "that the plaintiffs would have only the rights of bankruptcy estate creditors." *Id.*

The Seventh Circuit rejected the Arnett's erroneous standing argument on the basis that the direct fraud perpetrated on the plaintiffs placed them on a different level from the run-of-the-mill creditor:

> Here, the plaintiffs have shown a distinct injury from that of other creditors. Although a part of the underlying scheme was the diversion of corporate assets (for which the trustee may well have a cause of action against the Arnetts), an essential part of the scheme, on which its success depended, was the fraudulent taking from the plaintiffs of exceptionally large quantities of fuel. We conclude that the facts show an injury to the plaintiffs significantly different from the injuries to creditors in general resulting from the diversion of corporate assets.

Id. at 280.

Similarly, in *In re Colonial Ltd. Partnership Litigation*, 854 F. Supp. 64 (D. Conn. 1994), the plaintiffs (like Beck) alleged that the defendants' fraudulent conduct induced them to purchase their limited partnership interest, which eventually became worthless. *Id.* at 105. Exactly like the Defendant Directors, the defendants in *Colonial* argued that an investor in a limited partnership lacked standing to assert a claim because the injury was suffered by the partnership and the diminution in the value of the plaintiffs' investment was a derivative injury. *Id.* at 104. The court unequivocally rejected the defendants' argument:

> In the instant case, the plaintiffs do not seek recovery for an injury that is "derivative" of the injury, if any, suffered by the limited partnership. The plaintiffs do not merely claim that they suffered a diminution in the value of their investments; rather, they claim that the defendants' fraudulent conduct induced them to purchase their limited partnership interests, and that the result was reasonably foreseeable to defendants. Thus, the plaintiffs have alleged that they were directly injured by the defendants' conduct. These allegations clearly satisfy the test for proximate causation. Accordingly, the plaintiffs have standing to sue under RICO.

Id. at 105.

Additionally, in *Banker's Trust v. Rhoades*, 859 F.2d 1096 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989), the plaintiffs, creditors of a bankrupt corporation, sought recovery for acts of bankruptcy fraud and bribery that concealed a corporate asset during reorganization. *Id.* at 1098-99. The district court held that the plaintiffs lacked

standing to pursue RICO claims against the corporation's directors because that right belonged solely to the corporation itself – whose value had been depleted by the fraudulent transfer of its assets. *Id.* at 1100. The Second Circuit reversed, holding that, because the creditors suffered injuries *directly*, they would be allowed to pursue their claim notwithstanding the possibility that the "bankrupt corporation might also have suffered an identical injury for which it has a similar right of recovery." *Id.* at 1101. *See also Yates v. Jones National Bank*, 206 U.S. 158, *rev'd. in part on other grounds*, 206 U.S. 181 (1907) (creditor could sue individually); *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991) (plaintiff's allegations that he relied on defendant's misrepresentations that induced plaintiff to purchase company's stock satisfy section 1964(c)'s proximate cause requirement); *Cumberland Oil Corp. v. Thropp*, 791 F.2d 1037, 1042 (2nd Cir.), *cert. denied*, 479 U.S. 950 (1986) (where plaintiff alleges that it suffered damages from the fraud of a director of a bankrupt corporation, plaintiff has a right to recover separate from any claim the bankrupt corporation may have); *GICC Capital Corp. v. Technology Finance* Group, 30 F.3d 289 (2nd Cir. 1994), *aff'd*, 67 F.3d 463 (2nd Cir. 1995) (creditor has individual standing as long as his injuries meet proximate cause test); *Morley v. Cohen*, 888 F.2d 1006 (4th Cir. 1989) (plaintiff who is fraudulently induced into investing in defendant's scheme has RICO standing); *Haggiag v. Brown*, 728 F.Supp. 286, 295 (S.D.N.Y. 1990) (allegation that plaintiffs were fraudulently induced into loaning money to defendant states viable RICO claim).

In the present case, the District Court incorrectly held that "Beck's injuries as a creditor are no different than

any other creditor of SIG" (R6-191 at 18). Beck's claim regarding his $150,000 loan to SIG is different from that of other creditors whose injuries were derivative, in that Beck's claim is for fraudulent inducement. As with the plaintiffs in the above-described cases, Beck's injuries flow from the Defendant Directors' fraudulent conduct that induced Beck, directly, to loan SIG money, causing damages directly to Beck. At the time of the fraudulent conduct, Beck was not yet a creditor. Beck became a creditor only after, and as a direct result of, the Defendant Directors' successful scheme to defraud him. The scheme targeted Beck, and Beck fell victim to the material omissions aimed at inducing him into extending the unsecured loan to SIG. Beck's claim is for that fraudulent inducement, not the subsequent diminution in his ability to collect on the loan when the Defendant Directors caused SIG damages.

On the other hand, a typical creditor of SIG was not injured directly by the Defendant Directors' racketeering conduct. The typical creditor suffered damages solely derivatively, by reason of the damage done to SIG by the Defendant Directors after the credit had been extended.

The Defendant Directors' actions that fraudulently induced Beck to loan SIG money were "a substantial factor in the sequence of responsible causation," and Beck's "injur[ies] [were] reasonably foreseeable or anticipated as a natural consequence" of those actions. *Cox*, 17 F.3d at 1397; *Standardbred*, 985 F.2d at 104. This fraudulent inducement is precisely the type of conduct for which 18 U.S.C. §1964 provides a remedy.

C. Beck's claim for fraudulent inducement to guaranty a $7.5 million loan.

Beck has presented evidence that, pursuant to a scheme to defraud that targeted Beck and others – a scheme furthered by the Defendant Directors' use of the mails and wires – Beck was fraudulently induced to personally guaranty a $7.5 million loan from First Fidelity Bank to SIG, by which he has been directly injured. *See supra* at 8-14. Specifically, Beck was fraudulently induced by the Defendant Directors to personally guaranty the loan by the Defendant Directors' fraudulent misrepresentations of SIG's value, their fraudulent concealment of their illegal conduct, and their fraudulent concealment of their plans to terminate Beck. *Id.* This Court has expressly held that this type of allegation states harm suffered by an individual *directly*, not derivatively. *See, Warner*, 828 F.2d at 1531 & n.2 (plaintiff fraudulently induced into entering guaranty states RICO claim personally, not derivatively). This Eleventh Circuit holding was ignored by the District Court.

Moreover, guarantors are a form of "contingent creditors." *Mid-State Fertilizer v. Exchange Nat'l Bank*, 877 F.2d 1333, 1336 (7th Cir. 1989). Thus, the points and authorities contained in Section V(B), *supra*, equally support Beck's standing to pursue his guaranty claim.

The attorneys' fees incurred by Beck in defending the claim by First Fidelity Bank on the fraudulently induced guaranty present a proximately caused injury, the redress of which Beck has standing to pursue here. *See, e.g., Stochastic Decisions, Inc. v. Didomenico*, 995 F.2d 1158, 1167 (2nd Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 385 (1993)

(legal fees may constitute RICO damages if proximately caused by a RICO violation); *Malley-Duff & Associates v. Crown Life Ins. Co.*, 792 F.2d 341, 355 (3rd Cir. 1986), *aff'd*, 483 U.S. 143 (1987) (litigation expenses caused by predicate acts recoverable under RICO); *Miller v. Glen & Helen Aircraft, Inc.*, 777 F.2d 496 (9th Cir. 1985) (same); *Alexander Grant & Co. v. Tiffany Ind.*, 742 F.2d 408, 411 (8th Cir. 1984) (same), *readopted*, 770 F.2d 717 (8th Cir. 1985).

The very nature of these damages sought by Beck further proves that his injury is not derivative of the harm inflicted upon SIG. The District Court incorrectly reasoned that Beck's guaranty damages are derivative because "[i]f SIG were restored, Beck would be restored because SIG then would be able to pay its debts . . . to others – thereby relieving Beck of his obligation to pay as guarantor . . . [of] the First Fidelity loan" (R6-191 at 18). A full recovery by SIG, however, would not restore Beck. Even if SIG obtained the funds to pay back the First Fidelity loan, SIG would be under no obligation whatsoever to reimburse Beck for his legitimate mitigation expenses, the damages for which Beck is suing here.

D. Beck's RICO conspiracy claim.

1. This Court has not ruled on this issue yet.

The District Court's entry of summary judgment against Beck on his whistle blower RICO conspiracy claim was based upon two Eleventh Circuit cases: *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), and *O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) (R6-191 at 20-21). Neither of the two cases, however, denies Beck standing to raise his claim.[4]

First, *Morast* does not stand for the proposition that whistle blowers are absolutely barred from asserting a RICO conspiracy claim. In *Morast*, the complaint alleged that the plaintiff was discharged without justification and purely in retaliation for his reporting an irregular transaction and cooperating with the subsequent investigation. 807 F.2d at 929. The holding of *Morast* was limited to the particular facts of that case. *Morast's* holding is not an all out proscription of RICO conspiracy claims grounded on whistle blower injury, especially given the Court's suggestion that its holding might have been different if the complaint had alleged termination as a result of a refusal to participate in the illegal scheme. *Id.* at 933 n.8.

Further, Beck's claim raises several allegations that were not present in *Morast*, including that Beck was fired so that the Defendant Directors "could continue and preserve their racketeering activity," so that he could serve as "a scapegoat," and so that the Defendant Directors could hide their past indiscretions (R5-160 at ¶13). This Court has yet to consider whether these facts are sufficient to confer standing under RICO's conspiracy provision.

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[4] Even if this Court finds that its prior decisions in *Morast* and *O'Malley* do address the issue of whether whistle blowers are barred from asserting a RICO conspiracy claim, we respectfully urge that the Court reconsider this issue based upon the authorities and rationales set forth in subsection (2) of this section of the brief, *infra* at 36-40.

The differences between Beck's conspiracy claim and the claim advanced by the plaintiff in *Morast* provides a sound basis for distinguishing the two cases. The underlying scheme in *Morast* involved a conspiracy, the criminal object of which was a single banking violation. *Morast*, 807 F.2d at 928-29. The plaintiff there alleged that he was discharged afterwards, without justification and purely in retaliation for his reporting the banking violation and cooperating with the subsequent investigation. *Id.* at 929. An overt act, however, is "in furtherance" of a conspiracy only where it "contributes to accomplishing the charged conspiracy's [criminal] goal." *United States v. McKinney*, 954 F.2d 471, 475 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 662 (1992); *see also United States v. Cross*, 928 F.2d 1030, 1042 (11th Cir.), *cert. denied*, 502 U.S. 985 (1991); *United States v. Lignarolo*, 770 F.2d 971, 978 n.9 (11th Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986); *United States v. Pomranz*, 43 F.3d 156, 160 (5th Cir. 1995); *United States v. Wallach*, 935 F.2d 445, 470 (2nd Cir. 1991), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2414 (1993); *United States v. Hegwood*, 977 F.2d 492, 497 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2348 (1993). Firing an individual in retaliation for reporting an already completed illegal banking scheme cannot be said to be in furtherance of that scheme – retaliation after the fact in such a situation does not contribute to the underlying criminal purpose of the scheme, which is the banking violation itself. *See, e.g., McKinney*, 954 F.2d at 471. Thus, the plaintiff in *Morast* failed to allege that his firing was in furtherance of the conspiracy.

On the contrary, Beck has alleged and presented evidence that his termination was essential to furthering the

criminal schemes underlying the Defendant Directors' conspiracy, as he was still a threat or impediment to the conspiracy's unlawful objectives. *See supra* at 15-16. Thus, Beck was directly injured by an overt act of the conspiracy.

O'Malley also fails to establish that a whistle blower does not have standing to assert a RICO *conspiracy* claim. In *O'Malley*, a motion was filed seeking dismissal of a complaint containing two separate civil RICO counts: Count I of the complaint alleged a substantive violation under 18 U.S.C. §1962(c); Count II alleged a RICO conspiracy in violation of 18 U.S.C. §1962(d). *Id.* at 1559. Though *O'Malley* did bar claims based upon whistle blower allegations, this holding was expressly limited to the complaint's *substantive* RICO count. *Id.* at 1557. The Court's discussion of the RICO conspiracy count was completely separate from its holding on the issue of standing, dismissing the RICO conspiracy count for a lack of specificity:

> Count II need not detain us long. The district court dismissed Count II – the RICO conspiracy count – because the allegations of a conspiracy were merely conclusory and unsupported by any factual allegations. We find that dismissal to be proper.

Id. at 1560 (citations omitted). As more fully set forth in subsection 2 of this section of the Brief, *infra* at 36-40, this distinction does make a difference. Accordingly, *O'Malley* expressly left undecided the issue of whether a plaintiff had standing to raise a RICO conspiracy count based upon whistle blower injury. This issue remains undecided in this Circuit as of the date of this Appeal.

2. Beck has standing to assert this claim.

a. Law from other circuits.

Although the circuits have split on the issue, *see e.g., Bowman v. Western Auto Supply Co.*, 985 F.2d 383 at 387 (8th Cir. 1993) (noting split of authority), several cases from other jurisdictions have held that a whistle blower has standing to assert a RICO conspiracy claim. *See, e.g., Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3rd Cir. 1989); *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344 (7th Cir. 1992); *Callan v. State Chemical Manufacturing Co.*, 584 F.Supp. 619 (E.D.Pa. 1984); *see also Flinders v. Datasec Corp.*, 742 F.Supp. 929 (E.D.Va. 1990) (injury from overt act, not necessarily a predicate act of racketeering, is sufficient to confer standing if the overt act is wrongful). Respectfully, it is these cases that should guide this Court's ruling in the instant case.

b. The language of the RICO statute.

The courts that have rejected whistle blower standing under §1962(d) have typically based their decision upon the analysis that the whistle blower's injuries did not stem from a predicate act within the purview of §1961(1). *See, e.g., Bowman*, 985 F.2d at 388. However, as pointed out by the Seventh Circuit, this analysis ignores the clear language of the statute:

> [Section] 1964 allows suits by anyone "injured . . . by reason of a violation of §1962." Section 1962(d) prohibits conspiracies, so a person harmed by the conspiracy has been injured "by reason of" a RICO violation. Congress could have written RICO to state that only those injured by reason of predicate acts committed as part of a RICO violation could sue. It did not, and for courts to read §1964 as if that is what Congress wrote would be tantamount to rewriting the statute.

Schiffels, 978 F.2d at 349-50 (citations omitted).

It is axiomatic that the plain words of a statute are controlling as to the statute's meaning and effect. *See, e.g., Sedima*, 473 U.S. at 495 n.13; *Russello v. United States*, 464 U.S. 16, 20 (1983); *United States v. Turkette*, 452 U.S. 576, 580 (1981); *see also Connecticut Dept. of Income v. Heckler*, 471 U.S. 524, 530 (1985) (courts are required to interpret acts of Congress in such a way as to give meaning to each particular word in the text of the statute). The Supreme Court has already applied this maxim to the RICO statute. *See, Sedima*, 473 U.S. at 495 n.13 ("There is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement."). Accordingly, the plain words of the RICO statute support Beck's standing to assert his RICO conspiracy claim.

Moreover, requiring a showing of some form of predicate act injury before permitting recovery under §1962(d) would have the effect of completely nullifying that particular subsection. §1962 has four distinct subsections, and each subsection targets a particular type of criminal conduct. *See Danielsen v. Burnside-Ott Aviation Training Center*, 941 F.2d 1220, 1230 (D.C. Cir. 1991); *Standard Chlorine of Delaware, Inc. v. Sinibaldi*, 821 F.Supp. 232, 245 (D. Del. 1992). §1962(d) makes it unlawful for any person to conspire to violate the provisions of subsections (a), (b), or

(c). 18 U.S.C. §1962(d). On its face, §1962(d) targets conspiracies, *not* predicate acts. Moreover, §1962 already provides a remedy for persons injured by predicate acts. *Sedima*, 473 U.S. at 496-97. If §1962(d) is interpreted as providing a remedy for only damages flowing from the predicate acts themselves, then this subsection becomes superfluous. Such an interpretation would leave no avenue of redress for persons harmed by RICO conspiracies.

Additionally, the Supreme Court has mandated that "RICO is to be read broadly," with a view toward "activity which RICO was designed to deter," and to be "liberally construed to effectuate its remedial purposes." *Sedima*, 473 U.S. at 497-500. Given this edict, "it would be anomalous to allow plaintiffs to recover for harm suffered from investment in, or control or conduct of, a pattern of racketeering, yet preclude recovery for conspiracy to commit these violations simply because the overt act that furthers the conspiracy does not itself qualify as racketeering." *Shearin*, 885 F.2d at 1170.

c. Traditional conspiracy jurisprudence.

Rejection of the predicate act injury requirement is also warranted by traditional concepts of conspiracy law. A conspiracy to violate RICO does not "require anything beyond that required for a conspiracy to violate any other crimes." *United States v. Weissman*, 899 F.2d 1111 (11th Cir. 1990) (citations omitted); *United States v. Napolitan*, 791 F.2d 489 (7th Cir. 1986). The conduct targeted by §1962(d), like that of all laws prohibiting conspiracies, is the *agreement* to violate the substantive provisions of RICO, not the actual substantive violations, themselves. *United*

States v. Angiulo, 847 F.2d 956, 964 (1st Cir. 1988); *Shearin*, 885 F.2d at 1169; *United States v. Phillips*, 665 F.2d 971, 1038 (5th Cir.), *cert. denied*, 457 U.S. 1136 and 459 U.S. 906 (1982); *United States v. Glecier*, 923 F.2d 496, 500 (7th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 54 (1991); *United States v. Brooklier*, 685 F.2d 1208, 1222 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983). Thus, while §1962(d) requires an agreement to commit predicate acts, it does not require that any predicate acts actually be committed. *Shearin*, 885 F.2d at 1169; *Phillips*, 664 F.2d at 1038.

> [S]ince RICO conspiracy does not require the actual commission of a predicate act, it follows that the act causing plaintiffs' injury need not be a predicate act of racketeering. A person directly injured by an overt act in furtherance of a RICO conspiracy has been injured "by reason of" the conspiracy. Since a conspiracy to violate RICO's substantive provisions is itself a violation of RICO, *see* 18 U.S.C. §1962(d), a person injured "by reason of" the conspiracy has been injured "by reason of" the RICO violation. That is all that §1964 requires for standing to bring a civil RICO action.

Schiffels, 978 F.2d at 348-49. A contrary holding also would run contrary to the conspiracy law of this Circuit, which holds that §1962(d) is violated even where there are no predicate acts actually committed. *See, e.g., United States v. Caporale*, 806 F.2d 1487, 1515 (11th Cir. 1986), *cert. denied*, 483 U.S. 1021 (1987).

d. Public Policy.

Rejecting a whistle blower, such as Beck, standing to assert a RICO conspiracy claim would "assure employers that when troublesome employees threaten to disclose the commission of RICO violations, those employees can be threatened with termination to keep such violations hidden from public view . . . , ensur[ing] that fewer instances of fraud will be uncovered and that Congress's intent in enacting the RICO statute will be frustrated." *Bowman*, 985 F.2d at 389 (Heany, J., dissenting). There is no appropriate rationale for writing into the RICO statute a requirement that Congress expressly chose not to include.

E. Beck's claim for fraudulent inducement to purchase SIG stock.[5]

Generally, a shareholder may not sue directly for wrongs committed against a corporation that result merely in the diminution of the value of the corporation's shares and that damage the shareholder only derivatively in his capacity as a shareholder. *See, e.g., Stevens v. Lowder*, 643 F.2d 1078, 1080 (5th Cir. 1981). A widely-recognized exception to this principle, however, is that a shareholder may indeed bring suit *directly* if the defendants have violated an independent duty owing to that shareholder. *See, e.g., Chesbrough v. Woodworth*, 244 U.S. 72, 73-74 (U.S. 1917); *Citibank, N.A. v. Data Lease Financial Corp.*, 828 F.2d

[5] The District Court's Order failed to discuss the grounds for its rejection of this particular claim. The District Court limited its analysis to Beck's claim for fraudulent inducement not to sell his stocks, a separate and distinct claim (R6-191).

686, 693-94 (11th Cir. 1987); *Empire Life Ins. Co. v. Valdak Corp.*, 468 F.2d 330, 335 (5th Cir. 1972); *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893, 896 (5th Cir. 1968); *Manson v. Stacescu*, 11 F.3d 1127, 1131-32 (2nd Cir. 1993), *cert. denied*, ___ U.S. ___, 115 S.Ct. 292 (1994); *Ceribelli v. Elghanayan*, 990 F.2d 62, 63-65 (2nd Cir. 1993); *Warren v. Manufacturers Nat'l Bank*, 759 F.2d 542, 544 (6th Cir. 1985); *Stevens*, 643 F.2d at 1080; *Sherman v. British Leyland Motors, Inc.*, 601 F.2d 429, 439-40 (9th Cir. 1979); *Buschman v. Professional Men's Ass'n.*, 405 F.2d 659, 661-63 (7th Cir. 1969).

Under this exception, a shareholder may sue where there exists "a special relationship between the suing shareholder and the defendant, creating a duty, contractual or otherwise, other than that owed to the corporation." *Vincel v. White Motor Corp.*, 521 F.2d 1113, 1118 (2nd Cir. 1975). Thus, where a wrongdoer's actions have resulted in damage to both the corporation and the stockholder, the stockholder may sue *directly* as an individual in cases where the wrong itself amounted to a breach of a duty owed to the individual stockholder, personally. *See Empire Life*, 468 F.2d at 335; *Schaffer*, 397 F.2d at 896; *Borak v. J.I. Case Co.*, 317 F.2d 838, 842 (7th Cir. 1963). Thus, "the same facts which support the existence of a derivative cause of action to redress a wrong to a corporation may also state a direct cause of action by a shareholder for relief from injury caused by a defendant's fraudulent practices." *Small v. Gold*, 637 F.Supp. 1030, 1033 (D.N.J. 1986) (citing *Borak*, 317 F.2d at 844).

The United States Supreme Court decision in *Chesbrough*, a case involving Section 93 of the National

Banking Act, is particularly applicable. There, the defendants were corporate directors who made false and misleading reports concerning the financial condition of their bank. *Id.* at 74. The claim was for fraudulent inducement to purchase stocks – the plaintiff suffered damages because he "purchased stock upon the faith of the action of Defendants." *Id.* The Court found that these fraudulent inducement damages "are personal to the plaintiff," and that "he sues in his own right, not for the [corporation]." *Id.* at 77.

Likewise, in *Empire Life,* the plaintiff loaned the defendant $350,000 and, as collateral for the loan, the defendant pledged 50,000 shares of stock in National Insurance Company ("National"). 468 F.2d at 332. Subsequently, the plaintiff gained control of National. *Id.* At that time, the shares were worth over $1 million. *Id.* The plaintiff sold the shares for $150,000 and sought a deficiency judgment. *Id.* The defendant counterclaimed, alleging that the "plaintiff fraudulently and illegally used its control of National to devalue the corporation in violation of plaintiffs' duty to defendant as pledgee of the collateral." *Id.* The district court dismissed the defendant's counterclaim on the grounds that it was "essentially derivative in nature. . . . " *Id.* at n.2. The Fifth Circuit reversed, holding that the plaintiff's intentional acts of mismanagement, which may have also substantially diminished the value of all of National's stock, violated an independent duty owed to the defendant, injuring the defendant *directly*:

> Here, the defendant seeks damages as a *pledgor*. The fact that his pledge is stock and that if the manipulated depreciation of the stock is proven would also give rise to a derivative suit by defendant as *stockholder* should not foreclose the suit as pledgor. The role of pledgor and stockholder are not identical and defendant may play the part he chooses; when the curtain drops, the facts will invite *finis*.

Id. at 336.

Similarly, when a plaintiff such as Beck alleges that he was fraudulently induced into purchasing stock, the defendants owe him an independent duty as a stock purchaser, separate from the overall duty owed to stockholders in general. This independent duty owed to a stock purchaser has been expressly recognized as a basis for standing to assert a *direct individual claim* under RICO. *See Ceribelli,* 990 F.2d at 63; *see also Pelletier,* 921 F.2d at 1465. This is true "whether or not the corporation may also bring action." *Ceribelli,* 990 F.2d at 63; *see also* American Law Institute, *Principles of Corporate Governance* §7.01(B)-(C). Thus, under the proximate cause standard of *Holmes,* 503 U.S. 258, Beck has standing to assert this claim. *See especially Ceribelli,* 990 F.2d at 65 (applying *Holmes* and holding that "[w]hen misrepresentations induce a buyer to purchase stock, and his losses are a foreseeable consequence of the misrepresentations, [then] the misrepresentations proximately cause the buyer's injuries.").

The fraudulent misrepresentations and omissions regarding Beck's position as SIG's CEO, the Defendant Directors' illegal practices and their fraudulent promises to indemnify contractors induced Beck to purchase the SIG stock. *See supra* at 6-8, 14-15. This fraud practiced upon Beck occurred while Beck occupied the status of a

potential securities purchaser. This separate status gave rise to an independent duty distinct from the duties owed to a SIG stockholder. The breach of this separate and independent duty gives rise to an individual non-derivative cause of action in favor of Beck.

F. Beck's claim for fraudulent inducement to forebear from selling his stock.

Beck, as a director on SIG's board, had a right, separate and independent from the right owed to stockholders in general, to "acquire full information concerning the affairs of the corporation." 18B Am.Jur.2d *Corporations* §1454; *see also Manatee County Growers' Assoc. v. Florida Power & Light Co.*, 152 So. 181, 185 (Fla. 1934); *United Bonding Insurance Co. v. Dura-Stress, Inc.*, 243 So.2d 244, 246 (Fla. 2nd DCA 1971). Beck also had an independent right to the information arising from the business relationship existing between Beck and the Defendant Directors. *See United States v. O'Boyle*, 680 F. 34, 36 (6th Cir. 1982) (business relationship between plaintiff and defendant gave rise to a duty to disclose). A corresponding duty to disclose this information to shareholders in general does not exist: a corporation does not have "an affirmative duty to disclose all material information [where] there is no insider trading, no statute or regulation requiring disclosure, and no inaccurate, incomplete, or misleading prior disclosure." *Id.*; *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 27 (1st Cir. 1987); *Staffin v. Greenberg*, 672 F.2d 1196, 1204 (3rd Cir. 1982); *Schlanger v. Four-Phase Systems, Inc.*, 582 F.Supp. 128, 133 (S.D.N.Y. 1984); Block, Barton & Garfield, *Affirmative Duty to Disclose*

Material Information Concerning Issuer's Financial Condition and Business Plans, 40 Bus.Law. 1243, 1249-50 (1985). Specifically, courts have held that there is no duty on the part of a corporation to disclose to its stockholders illegal conduct perpetrated by the corporation. *See Roeder*, 814 F.2d at 26-28 (corporation did not have general duty to disclose to stockholders that it had paid a bribe to obtain subcontracts).

The Defendant Directors, however, had a duty to disclose their illegal conduct and the other material information to Beck, due to his capacity as their business associate and as a director of SIG. By locking Beck out of the "information loop," and devising an artifice to keep secret their illegal conduct, their plans to terminate Beck and the nature of their dealings with CPC, the Defendant Directors breached two separate independent duties owed to Beck. This directly and fraudulently induced him not to sell his stock in the Enterprise until it was too late. *See* R5-160-EX9 at 53-58; R5-160-EX10 at 273-74.

Accordingly, Beck does have standing to pursue this claim. This standing flows from the fact that Beck seeks redress of harms visited upon him directly, not the general diminution of stock value suffered indirectly by all of SIG's stockholders.

G. Beck's state law claims.

The District Court based its jurisdictional dismissal of Beck's state law claims on 28 U.S.C. §1367(c)(3), which authorizes district courts to decline jurisdiction over pendent state law claims where "the district has dismissed all claims over which [it] has original jurisdiction" (R6-191 at

24). The Court's reliance on section 1367, however, is misplaced.

Section 1367 applies "only to civil actions commenced on or after [Dec. 1, 1990]." Pub.L. 101-650, Title III, §310(c), 104 Stat. at 5113. Beck's pendent state law claims were filed as a cross-claim in New Jersey District Court on May 5, 1990 (R6-191 at 3; R5-160-EX1). Consequently, the District Court applied the wrong law in determining whether to maintain jurisdiction over Beck's pendent state law claims. *See, e.g., Edwards v. Okaloosa County*, 5 F.3d 1431, 1433 (11th Cir. 1993) (common law pendent jurisdiction doctrine, and not supplemental jurisdiction statute, applies to cases commenced prior to §1367's effective date of December 1, 1990); Pub.L. No. 101-650, §310(c), 104 Stat. at 5114.

When analyzed in light of the applicable case law, the District Court's decision to decline to exercise jurisdiction over Beck's state law claims constitutes an abuse of discretion. The United States Supreme Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), made clear that federal jurisdiction to try pendent claims exists even when the federal claim is dismissed before trial. *Id.* at 725-26; *Edwards*, 5 F.3d at 1433. While this decision is committed to the sound discretion of the district courts, such discretion is not unbridled. A district court is required to weigh four factors in reaching its decision on this issue: judicial economy, convenience, fairness and comity. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988). None of these factors were considered in the District Court's opinion.

Had the District Court applied the proper criteria, it would have found that dismissal of Beck's state claims was improper. In Florida, actions for fraud and misrepresentation must be filed within four years or they are forever barred by the statute of limitations. Fla.Stat. §95.11(3) (1995); *Sands v. Blando*, 575 So.2d 1306, 1306 (Fla. 3rd DCA 1991). This limitation period has long passed. Whether dismissal of a plaintiffs' state law claims will result in their being time-barred "is certainly a factor, if not the determinative factor, a district court should consider in deciding whether to maintain jurisdiction over pendent state claims once the federal claims have been resolved." *Pharo v. Smith*, 625 F.2d 1226, 1227 (5th Cir. 1980); *see also Garner v. Pearson*, 732 F.2d 850, 854 (11th Cir. 1984); *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corp.*, 711 F.2d 989, 999-1000 (11th Cir. 1989); *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir. 1982). In fact, this Court has stated that, where "the statute of limitations [has] run on [a plaintiff's] state claims while the action in federal court was pending, previous decisions of this court strongly indicate that dismissal of the state claims would be an abuse of discretion." *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 420 (11th Cir. 1984), *opinion clarified in part*, 821 F.2d 590 (1987); *see also Edwards*, 5 F.3d at 1434. Thus, as Beck's state law claims would be barred by the applicable statute of limitations, the District Court's Order declining to exercise jurisdiction over these claims should be reversed.

H. Beck's claims against Sparber.

M&S represented Sparber throughout this action. Respectfully, the filing of M&S's Notice of Appearance, Sparber's participation in the case, and the three and one-half year delay before Sparber asserted his service of process defense (especially given that the applicable statute of limitations had run) all mandate reversal of the District Court's dismissal of Beck's claims against Sparber.

1. Sparber was represented by M&S throughout this action.

Agency results where one person (the principal) authorizes another (the agent) to manage some affair for or on behalf of the principal, with the agent wielding more or less discretionary powers in dealings with third persons. *Economic Research Analysts, Inc. v. Brennan*, 232 So.2d 219 (Fla. 4th DCA 1970). The agent is said to step into the shoes of the principal and acts for him pursuant to the grant of authority vested in him by his principal. *King v. Young*, 107 So.2d 751 (Fla. 2nd DCA 1959).

The attorney-client relationship is a form of agent-principal relationship. *See Johnson v. Estate of Fraedrich*, 472 So.2d 1266 (Fla. 1st DCA 1985); *In re Brugh's Estate*, 306 So.2d 599 (Fla. 2nd DCA 1975); *Epperson v. Rupp*, 157 So.2d 537 (Fla. 3rd DCA 1963). The general tenets of agency law are controlling as to the scope of the attorney's authority and whether the attorney's conduct is binding upon the client. *See, e.g., State ex rel. Gutierrez v. Baker*, 276 So.2d 470 (Fla. 1973) (a client is generally

bound by the representations and acts of his attorney when they are within the scope of the attorney's capacity).

It is fundamental that the existence of an agency relationship may be shown by either direct or circumstantial evidence. *McCabe v. Howard*, 281 So.2d 362, 363 (Fla. 2nd DCA 1973). "An agent's authority to act on behalf of the principal may be inferred from acts, conduct, and other circumstances. . . . " *Overseas Private Investment Corp. v. Metropolitan Dade County*, 826 F.Supp. 1564, 1576 (S.D.Fla. 1993), *aff'd in part, rev'd in part on other grounds*, 473 F.3d 1111 (11th Cir. 1995). This inquiry is a question of fact and, even where the alleged principal and agent both deny the existence of an agency relationship, the trier of fact is entitled to infer the existence of such a relationship from the facts and circumstances of the case. *Id.*; *Watkins v. Sims*, 88 So. 764 (Fla. 1921); *Bradley v. Waldrop*, 611 So.2d 31, 32-33 (Fla. 1st DCA 1992); *Singer v. Star*, 510 So.2d 637, 640 (Fla. 3rd DCA 1987); *McCabe*, 281 So.2d at 363.

Therefore, the affidavits of Sparber and M&S (R2-64-EX A; R2-64-EX B), denying the existence of an attorney-client relationship, are not dispositive of this issue. The assertions raised in the affidavits, that the Notice of Appearance was filed solely due to clerical error and that no attorney-client relationship existed between Sparber and M&S with regard to this particular action, cannot be accepted solely on their face, given the substantial circumstantial evidence that such a relationship did, in fact, exist. At minimum, a question of fact remains. Perhaps most telling is the fact that it is M&S, ostensibly not previously representing Sparber in this matter, who filed

Sparber's Motion to Dismiss and who is now representing Sparber in this matter (R2-64).

The District Court failed to undertake the factual analysis as to whether these facts reveal that M&S did represent Sparber since early in this action. Instead of analyzing the underlying circumstances to determine whether M&S was acting as Sparber's agent, the District Court made only the following statement:

> While Sparber's attorney participated in depositions in this case, he represents in the motion that he participated as counsel for Littenberg, not Sparber. Beck does not dispute this assertion in his response.

(R6-168-14).

Beck, however, did dispute this assertion, arguing that the circumstantial evidence contradicted Sparber's and M&S's denial that M&S participated in the depositions on Sparber's behalf and otherwise represented Sparber in this matter (R2-79 at 5-6, 13-14). The crux of Beck's argument was actually that, Sparber and M&S's denials notwithstanding, the surrounding circumstances indicate that M&S was participating on behalf of Sparber, as well as Littenberg, during the extensive pretrial phase of this action. A factual determination must be made as to whether the circumstantial evidence presented was sufficient to establish that M&S was Sparber's agent throughout the course of this action.

2. Sparber waived his service defense.

The District Court's failure to evaluate the evidence of agency was critical. By not making that initial agency determination, the District Court was unable to properly evaluate Beck's contention that Sparber had substantially participated in this action prior to raising his service of process defense, thus waiving that defense.

Lack of personal jurisdiction is not a defense of right but rather a defense that can be waived by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165, 168 (1939); *Federal Home Loan Mortgage v. Dutch Lane Associates*, 775 F. Supp. 133, 136 (S.D.N.Y. 1991). Service of process upon a party is not an absolute prerequisite to personal jurisdiction. Fed.R.Civ.P. 12. Under the Rule, *any* jurisdictional defect stemming from insufficiency of process is waived unless it is raised in an answer or by motion to dismiss. *See also Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1298 (5th Cir. 1985). Rule 12(h), however, "sets only the outer limits of waiver; it does not preclude waiver by implication." *Kearns v. Ferrari*, 752 F.Supp. 749, 751 (E.D. Mich. 1990); *Marquest Medical Products, Inc. v. EMDE Corp.*, 496 F.Supp. 1242 (D.Col. 1980). Thus, a party need not actually file an answer or motion before waiver is found. *Trustees of Central Laborers' Wefare Fund v. Lowery*, 924 F.2d 731, 732 (7th Cir. 1991); *Broadcast Music, Inc. v. M.T.S. Enterprises, Inc.*, 811 F.2d 278, 281 (5th Cir. 1987); *Heleasco Seventeen, Inc. v. Drake*, 102 F.R.D. 909, 912 (D. Del. 1984). Waiver may arise "by implication from a defendant's seeking, taking, or agreeing to some step or proceeding in the

cause beneficial to himself or detrimental to plaintiff other than contesting jurisdiction. . . . " *Cactus Pipe & Supply v. M/V Montnatre*, 756 F.2d 1103, 1108 (5th Cir. 1985).

Where a defendant leads a plaintiff to believe that service of process is adequate and that no defense as to service would be interposed, courts have not hesitated to conclude that the defense is waived. *Lowery*, 924 F.2d at 733; *see also Broadcast Music, Inc.*, 811 F.2d at 281; *Norlock v. City of Garland*, 768 F.2d 654, 657 (5th Cir. 1985); *R. Clinton Construction Co. v. Bryant & Reaves, Inc.*, 442 F.Supp. 838, 848-49 (N.D. Miss. 1977). Even if a general appearance by a defendant does not constitute a waiver of the defense of lack of personal jurisdiction, if a defendant does appear, subsequent contest of the court's jurisdiction over the person must be timely. *Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994, 997 (1st Cir. 1983); *Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc.*, 376 F.2d 543 (3rd Cir. 1967); *Kearns*, 752 F.Supp. at 752; *Marquest Medical Products*, 496 F.Supp. at 1244; *Emerson v. National Cylinder Gas Co.*, 131 F.Supp. 299 (D.Mass 1955); 5 Wright and Miller, Federal Practice and Procedure, §1344, at 525, 526. Otherwise, the defendant is guilty of the equivalent of laches. *Marcial Ucin*, 723 at 997; *Kearns*, 752 F.Supp. at 752; *Vozeh v. Good Samaritan Hospital*, 84 F.R.D. 143 (S.D.N.Y. 1979). A defendant with an objection to service must move at the earliest possible opportunity to dismiss the complaint, before expiration of the statute of limitations. *Burton v. Northern Dutchess Hospital*, 106 F.R.D. 477, 481 (S.D.N.Y. 1985). If Sparber was indeed participating in this action, as the circumstantial evidence suggests, then he sat on his service challenge for more than three and one-half years

after M&S entered an appearance on his behalf.[6] He cannot now be heard to complain that service was never perfected upon him.

The facts presented by this case parallel those in *Kearns*. In *Kearns*, the defendants, who had made a general appearance through counsel but did not file a responsive pleading prior to their motion to dismiss for improper service, waited four years before raising their challenge to service. 752 F.Supp. at 751-52. The court found that defendants had waived their service defense, holding that "[f]our years is simply too long a period for defendants to wait. . . . " *Id.* at 752-53. Similarly, Sparber, who appeared through counsel over three and one-half years ago, simply waited too long to raise his Rule 4(j) motion. "[B]oth [Beck] and the Court would have been justified, had they given any thought to it, in thinking that [Sparber] had accepted service and acquiesced to personal jurisdiction." *Id.* at 752.

Similarly, in *Marcial Ucin*, the First Circuit rejected the argument that "the privilege of lack of personal jurisdiction may be retained by an appearing defendant for as long as he does not file a pre-answer motion or responsive pleading. . . . " 723 F.2d at 997. There, the court found that the defendant had waived its service defense, holding that, upon appearing, a defendant must timely contest the court's lack of personal jurisdiction – four years later was too long. *Id.*

---

[6] Sparber could have filed his Rule 4(j) motion as early as September 3, 1990, 120 days after Beck filed his Cross-Claim on May 5, 1990.

In reaching its decision, the court in *Marcial Ucin* also considered that the defendant's delay had exposed the plaintiff to a possible statute of limitations bar. *Id.* Sparber's dilatory conduct in this case has exposed Beck to similar danger. *See also Santos v. State Farm Fire & Casualty Co.*, 902 F.2d 1092 (2nd Cir. 1990) (defendant waived its insufficiency of service defense by waiting two years to raise it, well after the limitations period on plaintiffs' claims had expired); *Benviste v. Eiseman*, 119 F.R.D. 628 (S.D.N.Y. 1988) (medical malpractice defendant waived defense of insufficient service of process where it delayed almost three years in asserting defense and dismissal would result in plaintiffs' claim being barred by the statute of limitations); *Vozeh*, 84 F.R.D. 143 (defendant's silence for almost two years waives service defense, especially where plaintiff faces a statute of limitations bar as a result thereof); *Burton*, 106 F.R.D. 477 (three and one-half year delay constitutes a waiver).

Moreover, Sparber also waived his service of process objection by taking steps and participating in proceedings in this case beneficial to him, constituting waiver by implication. M&S's Notice of Appearance on behalf of Sparber requests that all parties forward pleadings and other pertinent forms of correspondence to M&S (R1-4). Sparber has thereby kept intimately in touch with the litigation. Sparber also participated in discovery.[7] This conduct clearly benefitted Sparber, as he is now as prepared to participate in the trial of this matter as any other defendant. This is the very type of conduct which should

[7] M&S has participated in each and every discovery event in this case to date, including virtually all of the depositions.

constitute a waiver of an insufficiency of service defense. *See also Datskow v. Teledyne, Inc.*, 899 F.2d 1298 (participating in discovery); *Broadcast Music, Inc.*, 811 F.2d 278 (attendance at pretrial conference).

VI. CONCLUSION

It is respectfully submitted that the District Court's entry of summary judgment on Beck's RICO claims, its dismissal of Beck's state law claims and its dismissal of Beck's claims against Sparber should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail on this 26th day of December, 1995 to all counsel on the attached service list.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 95-4844

ROBERT A. BECK, II,

Plaintiff-Appellant,

vs.

RONALD M. PRUPIS, LEONARD BELLEZZA, ERNEST J. SABATO, WILLIAM PAULUS, JR., HARRY OLSTEIN, FREDERICK C. MEZEY, BYRON L. SPARBER, JOSEPH S. LITTENBERG,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLEES, LEONARD BELLEZZA, ERNEST J. SABATO, WILLIAM PAULUS, JR., AND HARRY OLSTEIN

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STATEMENT REGARDING ORAL ARGUMENT

Because of the size of the record and because plaintiff is arguing for a modification or reversal of Eleventh Circuit RICO precedent, defendants Leonard Bellezza, William Paulus, Harry Olstein and Ernest J. Sabato request oral argument.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is typed in a manner that is not proportionally spaced. See 11th Cir. R. 32(b). The type size is 12-point and 10-pitch. The type style is courier.

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I. STATEMENT OF JURISDICTION

This is an appeal from an order entering summary judgment in favor of defendants. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES

1. Was the district court correct in holding that plaintiff lacked RICO standing to assert claims as a shareholder, creditor, guarantor and employee of Southeastern Insurance Group, Inc.?

2. Even if plaintiff had RICO standing, were defendants entitled to summary judgment because plaintiff was not injured by a "pattern of racketeering activity"?

3. Did the district court abuse its discretion by declining to exercise supplemental jurisdiction over plaintiff's pendent state law claims?

III. STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from an order entering summary judgment in favor of defendants Leonard Bellezza, William Paulus, Ernest J. Sabato, Jr., and Harry Olstein ("the Bellezza Group"). The district court held that plaintiff Robert A. Beck, II ("Beck") lacked standing to maintain his RICO suit against them. The court also declined to exercise supplemental jurisdiction over Beck's pendent state law claims. R6-191.

B. Course of the Proceedings and Disposition Below.

Beck is a former shareholder, officer and director of Southeastern Insurance Group, Inc. ("SIG"). This suit is the latest in a long line of suits involving the same series of alleged wrongful actions committed by SIG's former officers and directors, including the Bellezza Group.

This litigation began on May 15, 1989, when Beck filed an action in Florida state court against the Bellezza Group and other SIG principals, alleging violations of Florida's RICO statute and Florida common law ("the Florida state action"). R5-138-Exh.E. Beck alleged that defendants had committed substantive and conspiracy RICO violations by terminating him in retaliation for his blowing the whistle, or threatening to blow the whistle, on defendants, who he alleged had engaged in a pattern of racketeering activity against numerous third parties. R5-138-Exh.E, Counts I-IV.

In August 1989, soon after Beck filed the Florida state action, SIG shareholders filed a derivative action in federal district court in New Jersey under the federal RICO statute ("the Shareholders' Derivative action"). R5-138-Exh.F. While SIG was the nominal defendant, the principal defendants were Beck and all of SIG's officers and directors, including the Bellezza Group. The shareholders alleged the same pattern of racketeering activity that Beck alleged in the Florida state action, but they alleged derivative injury for the lost value of their investments. R5-138-Exh.F, ¶¶73-75, 106-16.

On November 28, 1989, the Florida state court dismissed Beck's substantive RICO claims, holding that he lacked RICO standing to sue as a terminated whistleblower. R5-138-Exh.H. Beck then voluntarily withdrew his RICO conspiracy claim and Florida state claims. R5-138-Exh.J.

SIG declared bankruptcy in January 1990, at which point the Shareholders' Derivative action was taken over by SIG's bankruptcy trustee, Jules Bagdan. R5-138-Exh.G. In May 1990, Beck reasserted his dismissed RICO claims as a crossclaim in the Shareholders' Derivative action, recasting them as purported violations of federal RICO rather than Florida RICO. He also reasserted his Florida common law claims. R5-138-Exh.A. Beck brought this action in New Jersey even though his employment agreement contained a Florida forum-selection clause. R5-138-Exh.A, Exh.A ¶14.1. This was an apparent attempt to forum-shop, since the Eleventh Circuit had held that whistleblowers lack standing to assert RICO conspiracy claims while the Third Circuit had reached the opposite conclusion. *Compare Morast v. Lance*, 807 F.2d 926, 933

(11th Cir. 1987) *and O'Malley v. O'Neill*, 887 F.2d 1557, 1561-62 (11th Cir. 1989) *with Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1169 (3d Cir. 1989).

Beck's federal RICO crossclaim alleged 50 predicate acts, consisting of the same series of events and the same alleged pattern of racketeering activity as were alleged in his dismissed Florida action and in the Shareholders Derivative action. *See* R5-138-Exh.A, ¶¶79-128; R5-138-Exh.E, ¶¶55-79. In his crossclaim, Beck again alleged that the Bellezza Group and other directors conducted SIG's affairs through a pattern of racketeering activity, and he claimed damages stemming from his alleged status as a terminated whistleblower. R5-138-Exh.A, ¶¶5, 11-41, 79-128. In addition, Beck alleged, as RICO injuries, damages stemming from his status as a SIG creditor and guarantor. R5-138-Exh.A, ¶¶43-78. On March 5, 1991, the New Jersey district court transferred Beck's crossclaim to the Southern District of Florida pursuant to the forum-selection clause. R5-138-Exh.L at 12-30.

During the same time period, the Florida and New Jersey Departments of Insurance placed SIG's three operating insurance subsidiaries into receivership and then sued SIG's principals – including the Bellezza Group – for mismanagement and looting. R5-138-Exhs. M-O. These three receivers' lawsuits alleged wrongful acts similar to those Beck alleged in his Florida state action and in his federal crossclaim. The receivers' lawsuits sought to recover damages for the benefit of the creditors and shareholders of the insolvent insurance subsidiaries. *Id.* In May 1993 the Bellezza Group and other SIG directors paid a substantial settlement to the Florida receiver on

behalf of two of the subsidiaries; Beck, as a SIG shareholder and creditor, is a beneficiary of that recovery. R5-138-Exh.P.

In April 1994, three years after the transfer of his crossclaim to the Southern District of Florida, Beck filed his Response to RICO Case Standing Order ("RICO Case Statement"), asserting that the 50 alleged predicate acts of mail fraud, wire fraud and extortion caused him to sustain direct injury – even though those acts were committed against SIG and other third parties. R5-138-Exh.B, ¶5. In addition, Beck asserted that he lost the value of $828,234 in stock because of SIG's bankruptcy. R5-138-Exh.B, ¶¶4.a.iv, 17.

On March 30, 1995, the Bellezza Group moved for summary judgment on the grounds that Beck lacked RICO standing to sue as a creditor, shareholder, guarantor and terminated whistleblower, that Beck could not prove a pattern of racketeering activity, and that Beck's claims were barred by res judicata and collateral estoppel. R5-136; R5-164 at 5, 9 n.7; R6-178; R6-179.

On June 7, 1995, the district court granted defendants' summary judgment motion, rejecting defendants' preclusion arguments (R6-191 at 4-10) but holding that Beck's injuries were not proximately caused by defendants' alleged misconduct and that he therefore lacked RICO standing. R6-191 at 10-24. The district court declined to reach the "pattern" issue. R6-191 at 11. The court declined to exercise supplemental jurisdiction over Beck's state law claims. R6-191 at 24. Beck filed his notice of appeal on July 5, 1995. R7-193.

On July 7, 1995, the Bellezza Group moved for sanctions pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927, and also moved for costs. R7-196; R7-194. On November 21, 1995, the court denied the motion for sanctions without making any factual findings and granted in part and denied in part the motion for costs. R7-223. On December 21, 1995, the Bellezza Group filed an appeal of the November 21 order. R7-224. The parties have filed a joint motion to consolidate the appeals, but no order has yet been entered.

C. Statement of Facts.

SIG was a Florida-based insurance holding company. R5-138

Exh.B., ¶¶2, 4.a. From 1983, when SIG was founded, until it declared bankruptcy in January 1990, SIG owned three operating insurance subsidiaries: Southeastern Casualty & Indemnity Insurance Co., Inc. ("SCI-Fla"); Southeastern Casualty & Indemnity Insurance Company of New Jersey, Inc. ("SCI-NJ"); and Southeastern Reinsurance Company, Inc. ("SRC") (collectively, "the Insurance Subsidiaries"). The Insurance Subsidiaries wrote surety bonds for construction contractors. R5-138-Exh.A, ¶7.

Beck was SIG's president from 1983 to May 1988, when he was terminated upon the advice of Firemark Consultants, Inc., an insurance consulting firm. Firemark had conducted an extensive review of SIG and, in a detailed report, made numerous recommendations regarding SIG's operations. One of those recommendations was the termination of several SIG officers – Beck,

Ronald Prupis and Linda Burton – for substandard management practices. R6-191 at 1; R5-138-Exh.C.

Beck's RICO Allegations

In his crossclaim and RICO Case Statement, Beck delineated 50 RICO predicate acts allegedly committed by defendants, not against Beck himself but against third parties. R5-138-Exh.A, ¶¶79-128; Exh.B, ¶5. Specifically, Beck alleged the following:

> • Numerous acts of "extortion" and mail/wire fraud committed *against contractors* seeking bonds, who were required to pay allegedly unlawful fees to Contractors Performance Corporation ("CPC"), a SIG subsidiary, as a condition of obtaining the bonds. R5-138-Exh.A, ¶¶23-30, 79-128.
>
> • Various acts of "looting" *of SIG's Insurance Subsidiaries*, R5-138-Exh.A, ¶¶31-41, 95-96, 112-13.
>
> • Three acts of mail/wire fraud committed *against First Fidelity Bank*, which loaned $7.5 million to SIG in December 1987 in reliance on allegedly inflated financial projections. R5-138-Exh.A, ¶¶108-09, 111; R5-138-Exh.B, ¶5.[1]

[1] The remaining predicate acts were five alleged phone calls supposedly related to Beck's termination as president in May 1988. R5-138-Exh. A, ¶¶119-23. But since employment termination is not criminal, these phone calls cannot be considered predicate acts.

Thus, all of the alleged predicate acts were directed at third parties. Nevertheless, in his RICO Case Statement, Beck claimed that he was directly injured by these predicate acts. Beck asserted: "By looting SIG and engaging in their illegal conduct, the Defendants caused the value of Beck's stock to greatly depreciate." R5-138-Exh.B, ¶4.a.iv. Similarly, in response to the question, "Describe the *direct causal relationship* between the alleged injury and the violation of the RICO statute, Beck stated, in part: "The defendants' continued violations of the RICO statute *resulted in the failure of SIG*, causing substantial losses to Beck." R5-138-Exh.B, ¶16 (emphasis added). Beck additionally alleged that he suffered the following damages:

(1) *Injury as a creditor.* Beck alleged that he was fraudulently induced to extend an unsecured $150,000 loan when he purchased SIG debentures in August 1986 and that he lost the value of that loan when SIG went bankrupt.

(2) *Injury as a shareholder.* Beck alleged that he was fraudulently induced to purchase $75,000 of stock in August 1986 (along with the debentures), that he was fraudulently induced to forebear from selling $828,234 in stock during 1987, and that he lost the value of all of his stock when SIG went bankrupt.

(3) *Injury as a guarantor/creditor.* Beck alleged that he was fraudulently induced to guarantee a $7.5 million loan that First Fidelity Bank made to SIG in December 1987, and that SIG's bankruptcy caused SIG to default on that loan and to trigger Beck's Guaranty.

(4) *Injury as a terminated whistleblower.* Beck alleged that defendants created false causes for his termination as president in May 1988 in order to prevent him from blowing the whistle on their alleged illegal conduct, allegedly causing him to lose $1,368,741.

R5-138-Exh.B, ¶¶4.a., 16-17.

As discussed below, Beck's own deposition revealed that all of these alleged injuries occurred derivatively – i.e., as an indirect result of SIG's demise, not because of any direct fraud against Beck.

Beck's Indirect Injuries Involving the Stock and Loan

In his deposition, Beck admitted that the losses of his $150,000 loan and $828,234 in stock occurred because SIG went bankrupt, and that SIG's bankruptcy resulted from the RICO predicate acts allegedly practiced upon third parties. Beck repeatedly conceded that the targets and direct victims of the alleged RICO predicate acts were as follows: the Insurance Subsidiaries and SIG, whose value declined to the point of bankruptcy; First Fidelity, which issued the $7.5 million loan based on allegedly inflated financial projections; contractors that were supposedly extorted; and bond claimants who could not recover on the bonds because the Insurance Subsidiaries' reserves were depleted. Beck admitted that shareholders and creditors, who lost the value of their investments/loans when SIG went bankrupt, were only derivatively injured. R5-138-Exh.Q (Vol. VIII at 86-88, 123-29, 137-38; Vol. V at 228-38).

For example, Beck explained the reasoning behind his allegation that the contractors had been victimized by "extortion." He testified that CPC, a SIG subsidiary, charged the contractors a fee for monitoring their performance on construction jobs to prevent a default that would trigger the Insurance Subsidiaries' bond obligation. Beck testified that the contractors were "extorted" because SIG supposedly conditioned issuance of the bond on the contractor's payment of the CPC fee, which Beck believed was an illegally-disguised insurance premium. Beck's theory was that, because SIG charged these additional fees, it was more willing to issue high-risk bonds to poor-quality contractors. Beck testified that this created a cash-flow mentality, with SIG issuing high-risk bonds by demanding illegal fees from contractors, thus generating premiums without regard for possible future claims. R5-138-Exh.S.

But, most importantly, Beck also testified that the injury from these activities was suffered directly only by SIG, its Insurance Subsidiaries and the contractors who paid the monitoring fees. He conceded that the Insurance Subsidiaries suffered the primary injury, because the "high risk bonds" resulted in too many claims against them, thereby depleting their assets. He also conceded that SIG suffered a secondary injury, because the value of its holdings declined when the Subsidiaries became insolvent. Finally, Beck admitted that shareholders and debenture holders – such as himself – suffered only a tertiary injury, because their investment became worthless only when SIG's value declined, which in turn occurred because the Insurance Subsidiaries became insolvent. R5-138-Exh.T.

Additionally, Beck admitted that the "looting" of the Insurance Subsidiaries caused direct injury only to SIG and the Insurance Subsidiaries. He testified that the Insurance Subsidiaries were hurt directly because their "policyholders surplus and unearned premium reserves" were depleted, which rendered them unable to pay debts and insurance claims. Beck further admitted that SIG was hurt directly because the value of its wholly-owned subsidiaries was destroyed. And he conceded that he and all the other stockholders and debenture holders were hurt only indirectly or derivatively, because the Insurance Subsidiaries became insolvent, thus diminishing the value of the stock and debentures. R5-138-Exh.R.

In sum, Beck conceded that he and all the other shareholders and debenture holders lost the value of their investments when "SIG went out of business" because of the alleged RICO predicate acts directed at the Insurance Subsidiaries, SIG and contractors. *See also* R5-138-Exh. U at 138; Exh. V at 132-55.

Beck's Indirect Injury Involving the Guaranty

Beck alleged that defendants' conduct caused him to incur damages from signing a Guaranty of the $7.5 million loan from First Fidelity Bank to SIG. R5-138-Exh.A, ¶¶61-73; R5-138-Exh.B, ¶2.a.vi. However, as is explained below, Beck never paid any money on the Guaranty, and he admitted that he had full knowledge of SIG's financial condition when he signed the Guaranty.

On December 30, 1987, First Fidelity loaned $7.5 million to SIG and required all 10 senior officers and directors – including Beck and the Bellezza Group – to sign a

personal guaranty. R5-138-Exh.A and Exh. D thereto; R6-165-Exh.C. SIG defaulted on the loan more than a year later. On November 8, 1989, First Fidelity filed suit in New Jersey against SIG and the guarantors to recover the $3.3 million outstanding balance. R5-138-Exh.W. Beck defended the action and filed a third-party complaint against Lampf, Lipkind, Prupis & Petigrow ("L2P2") – SIG's legal counsel – for malpractice; he claimed that the law firm negligently advised him as to his liability on the Guaranty. R5-138-Exh.W, ¶5.

On June 29, 1990, the New Jersey court entered judgment against the guarantors for the $3.3 million balance. R5-138-Exh.X at 2. Beck paid no money pursuant to this judgment, however. Rather, the Bellezza Group paid and took an assignment of the judgment and then asserted claims against L2P2 for malpractice for advising the directors to sign the Guaranty. The Bellezza Group recovered a substantial sum from L2P2 in a settlement, thereby extinguishing the First Fidelity judgment. R5-138-Exhs.Y & Z.

Although Beck never paid a cent on the Guaranty, he continued to prosecute his third-party complaint against L2P2, seeking to recover the attorneys' fees he claimed to have incurred in defense of the First Fidelity action. Beck and L2P2 settled, with Beck receiving $425,000. R5-138-Exh.1. The only RICO damage Beck alleges here with respect to the Guaranty is the amount of attorneys' fees incurred against First Fidelity but not recouped from L2P2. R5-159 at 7.

In opposing defendants' summary judgment motion, Beck failed to submit any affidavit revealing what that

uncompensated amount of attorneys' fees was. All he presented was an unsupported, unsworn statement contained in a footnote of his opposition brief, which asserted that his "total attorneys' fees in defending that [First Fidelity] case exceed $800,000." R5-159 at 10 n.8. That astronomical amount of attorneys' fees, for an uncomplicated guaranty action, is difficult to believe. In any event, the amount of Beck's legal fees is irrelevant because, as shown in the Argument, those fees are not compensable as RICO damages.

Beck's Change of Position

As noted above, Beck's crossclaim and RICO Case Statement alleged that Beck was *directly* injured by 50 predicate acts that were directed against third parties. R5-138-Exh.B, ¶¶4.a.iv., 16. Beck thus forced defendants to engage in protracted and expensive discovery to refute those 50 acts. R7-196 at 2-3; R5-138-Exhs. D, Q-V, 3-10, 12-18. But when faced with his own damaging deposition testimony – and legal precedent holding that shareholders, creditors and whistleblowers lack RICO standing – Beck recanted his original contention that the 50 pleaded predicate acts caused him direct RICO injury. He did not do so, however, until he opposed the Bellezza Group's summary judgment motion, when he conceded: "Beck does *not* seek any damages resulting from *those* predicate acts. They are plead in the instant case merely to satisfy RICO's pattern requirement." R5-163 at 5 (emphasis by Beck). In short, it took Beck six years to abandon his claim that he was directly injured by the predicate acts that had targeted third parties.

Accordingly, in his summary judgment opposition, Beck refocused his case and argued solely that he was directly damaged by separate acts of alleged fraudulent misrepresentation. Specifically, Beck asserted (i) that he was defrauded when he extended the $150,000 loan and purchased $75,000 in stock, transactions that occurred when Beck purchased a SIG stock/debenture "unit" in an August 1986 private offering; (ii) that he was fraudulently induced to sign the First Fidelity Guaranty; (iii) that he forbore from selling his $828,234 of stock because of defendants' alleged concealment of their alleged illegal activities and of SIG's financial condition, a claim Beck did not plead; and (iv) that defendants created fraudulent causes for his May 1988 employment termination. R5-163 at 5-18.

Beck's pleadings were devoid of any predicate acts committed in connection with these alleged frauds. The only predicate acts he identified were the acts of "extortion" and alleged mail/wire fraud committed against third parties, which he had admitted did not cause him any direct injury. R5-138-Exh.A, ¶¶79-128; Exh.B, ¶5; R5-163 at 5. Beck asserted conclusorily that the alleged frauds committed against him constituted RICO predicate acts, but he failed to plead any use of the mails or wires in connection with those alleged fraudulent acts. R5-138-Exh.A, ¶¶42-78.

The Lack of Factual Support for Beck's Fraud Claims

Beck's fraud allegations were groundless, as the district court found. R6-191 at 16. Both in the district court and here on appeal, Beck has constructed a house of cards

based on distortions of cited factual exhibits, on factual statements that have no support in the record, and on the mere unsubstantiated allegations of his pleadings.

For example, as discussed in the Argument in greater detail, Beck's allegation that he was fraudulently induced to purchase the stock/debenture unit in August 1986 had no support in the record. He alleged that defendants promised to maintain him as CEO and that he would not have purchased the SIG unit had he known they were going to remove him as CEO. R5-163 at 7-8. But as the district court found, this allegation was a "bald assertion" unsupported by any record evidence. R6-191 at 16.

Beck's allegation that he was fraudulently induced to sign the First Fidelity Guaranty similarly lacked foundation. In his pleadings and summary judgment opposition, Beck alleged that he signed the Guaranty in reliance on an allegedly inflated estimate of SIG's projected financial performance. R5-138-Exh.A, ¶¶61-73; Exh.B, ¶2.a.vi; R5-163 at 9. In his deposition, however, Beck conceded that he did not receive the financial projection before signing the Guaranty; thus, he could not possibly have relied upon it. R5-138-Exh.15.

Beck also alleged that he would not have signed the Guaranty if defendants had not "concealed" allegedly illegal transactions with a contractor called Chief Structures. That alleged concealment supposedly inflated SIG's, financial condition. R5-138-Exh.A, ¶¶19, 61-73; R5-163 at 9-13. Beck alleged that defendants caused SIG to advance substantial sums of money to Chief because Chief was having difficulty completing its construction projects. He further alleged that these advances should

have been considered "claims" or "losses" on SIG's financial statements but that defendants treated them as "assets" or "notes receivable," thus inflating SIG's value. R5-138-Exh.A, ¶19. Beck alleged that he signed the Guaranty in reliance on financial records that made no mention of the Chief transactions. R5-138-Exh.A, ¶¶61-73. At his deposition, however, Beck admitted that he had full knowledge of the Chief transactions and of SIG's finances when he signed the Guaranty. R5-138-Exhs.3-12. *See infra* at 32-35.

D. Statement of the Standards of Review

This Court uses a plenary standard of review on an appeal from the entry of summary judgment. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991). With respect to the refusal to exercise jurisdiction over the pendent state law claims, the issue is whether the district court abused its discretion. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

IV. SUMMARY OF THE ARGUMENT

The district court was correct in entering summary judgment in favor of the Bellezza Group. Under controlling decisions of the Supreme Court and Eleventh Circuit, Beck lacked standing to assert RICO claims in his capacity as a creditor, shareholder, guarantor and employee. The injuries Beck sustained were derivative, resulting from the general demise of SIG, not from any predicate acts targeted directly at him since there was no factual foundation for Beck's fraud allegations. Moreover, Beck's

loss of employment was caused by the non-criminal decision to terminate him, not by any RICO predicate act.

Nor could Beck prove that he was injured by a "pattern of racketeering activity." The predicate acts alleged were, as Beck himself admitted, directed against third parties, not against him. Those predicate acts were wholly unrelated to the frauds allegedly directed at Beck.

Finally, the district court was well within its discretion in declining to exercise jurisdiction over Beck's pendent claims. Beck cannot complain that his state law claims are barred by the statute of limitations when it was he who voluntarily dismissed those claims from the prior Florida lawsuit in order to raise them in this baseless federal RICO suit.

V. ARGUMENT

POINT I

THE DISTRICT COURT WAS CORRECT IN HOLDING THAT BECK LACKED RICO STANDING.

In holding that Beck lacked RICO standing, the district court noted that "RICO does not provide a remedy for every injury that may be traced to predicate acts." R6-191 at 12. The court explained that, despite the apparently broad language of 18 U.S.C. § 1964(c) – RICO's civil damage provision – plaintiffs must prove that their injuries were directly and proximately caused by predicate acts of racketeering. R6-191 at 12-13. The courts' analysis and conclusion were correct.

A. To Have RICO Standing, a Plaintiff Must Surmount Two Important Standing Limitations.

The district court held that, to have RICO standing, a plaintiff must prove that § 1962 was violated and that, under § 1964(c), the plaintiff was "injured in his business or property by reason of" the RICO violation. R6-191 at 10, *citing Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir. 1994); *O'Malley v. O'Neill*, 887 F.2d 1557, 1561 (11th Cir. 1989). The district court recognized that "in the 11th Circuit, a plaintiff has standing to sue under section 1964(c) only if his injury flowed directly from the commission of the predicate acts." R6-191 at 12, *citing Pelletier v. Zweifel*, 921 F.2d 1465, 1497, 1499 (11th Cir. 1991). This rule embodies two important limitations on RICO standing.

First, a RICO plaintiff must show that his "injury flowed from a particular predicate act." *Pelletier*, 921 F.2d at 1497. As the Supreme Court has held, plaintiff's injury must result from the criminal racketeering activity "which RICO was designed to deter," and not from mere tortious "other conduct." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496-97 (1985). *See also Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 31 (1st Cir. 1987) (RICO not intended to target "ordinary commercial fraud").

Second, defendants' predicate acts must be the "proximate" cause, and not merely the "but for" cause, of plaintiff's injury. R6-191 at 12, *citing Holmes v. Security Inv. Prot. Corp.*, 112 S. Ct. 1311, 1317-18 (1992). This proximate cause requirement demands "some *direct relation* between the injury asserted and the injurious conduct

alleged," and precludes recovery by a plaintiff who complains of harm "flowing merely from the *misfortunes visited upon a third person by the defendant's acts.*" *Holmes*, 112 S. Ct. at 1318 (emphasis added); R6-191 at 12, *quoting Pelletier*, 921 F.2d at 1499 (plaintiff does not have standing for damages "caused indirectly by the predicate act"). This proximate cause requirement means that where, as here, the plaintiff alleges mail or wire fraud, he must prove that he was " 'the target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme.' " R6-191 at 13, *quoting Pelletier*, 921 F.2d at 1499-1500; *O'Malley*, 887 F.2d at 1561, 1563 & n.9.

In *Holmes*, the Supreme Court reasoned that a suit by an indirectly injured plaintiff is inappropriate for three reasons: such a suit makes it impossible to determine whether plaintiff's injury was caused by a RICO violation or by some independent cause; such a suit makes it difficult for courts to apportion damages among victims removed at different levels of injury from the violation; and, in any event, such a suit is not necessary because the directly injured victim can usually be counted on to vindicate the law as a private attorney general. 112 S. Ct. at 1318. Thus, "[t]he proximate cause requirement serves the interests of judicial economy by allowing courts to determine in a derivative action one damage award that will restore the corporation and, therefore, its shareholders, creditors, and employees." *Manson v. Stacescu*, 11 F.3d 1127, 1132 (2d Cir. 1993).

B. Beck's Shareholder/Creditor Claims Are Derivative.

These RICO standing limitations have been applied in a variety of contexts, including the shareholder/creditor context. Here, Beck alleges that defendants' conduct caused him to lose the value of an unsecured $150,000 loan and of $75,000 of SIG stock. As the district court noted, both of those transactions occurred when Beck purchased a $225,000 stock/debenture unit in an August 1986 private offering. R6-191 at 16; R5-161-Exh.12 at 5.

The Circuit Courts are unanimous in holding that a shareholder or creditor who loses the value of his investment or loan because of RICO predicate acts visited upon the corporation lacks RICO standing. *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 29 (1st Cir. 1987); *Manson v. Stacescu*, 11 F. 3d 1127, 1131 (2d Cir. 1993); *In re Sunrise Sec. Litig.*, 916 F.2d 874, 883, 888-89 (3d Cir. 1990); *Warren v. Manufacturers Nat. Bk. of Detroit*, 759 F.2d 542, 544 (6th Cir. 1985); *Mid-State Fertilizer Co. v. Exchange Nat. Bk.*, 877 F. 2d 1333, 1335-36 (7th Cir. 1989); *Brennan v. Chestnut*, 973 F.2d 644, 648 (8th Cir. 1992); *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1419-20 (9th Cir. 1995); *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987).

The courts reason that the RICO violation injures only the corporation directly, whereas the shareholders and creditors are merely injured indirectly or derivatively as a secondary consequence of the corporation's general demise. *See, e.g. Manson*, 11 F.3d at 1130 (obligors on $450.000 corporate loan lacked RICO standing); *Whalen v. Carter*, 954 F.2d 1087, 1092-94 (5th Cir. 1992) (debenture

holders lacked RICO standing where fraud devalued corporation generally); *National Enterprise v. Mellon Fin. Serv.*, 847 F.2d 251, 254 (5th Cir. 1988) (creditor lacked RICO standing since injury was caused by corporation's bankruptcy, not by predicate acts that depleted corporate assets); *Crocker v. FDIC*, 826 F.2d 347, 350 (5th Cir. 1987) (shareholders lacked RICO standing where diminution in stock value occurred because of mismanagement).

As Beck himself has conceded, the predicate acts he pleaded were directed at and injured SIG and other third parties. R5-163 at 5. Beck has also conceded that he lost the value of his stock and loan only because "SIG went out of business." R5-138-Exh. U at 138. Therefore, Beck was not injured by any predicate act, and there is no proximate cause between the alleged RICO violations and his injuries. *See Pelletier*, 921 F.2d at 1499-1500. Beck is merely complaining of "harm flowing . . . from the misfortunes visited upon a third person," namely, SIG. *Holmes*, 112 S. Ct. at 1318.

Application of the three *Holmes* factors confirms that Beck's shareholder/creditor claims are derivative. First, it is impossible to determine whether SIG's bankruptcy and the resulting diminution in value of Beck's investment were caused by a RICO violation or some independent factor, such as the recessionary economy that existed in the late 1980's, sloppy underwriting practices, or poor business management by Beck and other officers. *See Holmes*, 112 S. Ct. at 1318, 1320.

Second, Beck cannot be granted standing without the adoption of complicated rules of apportioning damages

to protect other creditors and to prevent Beck from gaining a double recovery. *Holmes*, 112 S. Ct. at 1318, 1320. To allow Beck to pursue an individual RICO claim for a derivative injury would permit "double counting" of damages, since Beck would share in any recovery obtained by the trustee or receivers. *Mid-State Fertilizer*, 877 F.2d at 1335-36. Indeed, in May 1993 the Bellezza Group and other SIG directors paid a substantial settlement to the Florida receiver on behalf of SRC and SCI-Fla, and Beck, as a SIG shareholder and creditor, is a beneficiary of that recovery. R5-138-Exh.P.

Third, there is no need to grapple with these issues, since the directly injured victims – SIG and the Insurance Subsidiaries – have already filed suit to vindicate their rights. The same allegations Beck makes here have been the subject of four separate lawsuits by SIG's bankruptcy trustee and the Subsidiaries' receivers, in efforts to restore monies to the bankrupt estate for the benefit of *all* creditors and shareholders. A suit by an "indirectly injured victim" such as Beck "could be an attempt to circumvent the relative priority (his) claim would have in the directly injured victim's liquidation proceedings." *Holmes*, 112 S. Ct. at 1320-21, *citing Mid-State Fertilizer*, 877 F.2d at 1336; *see Rand v. Anaconda-Ericsson*, 794 F.2d 843, 849 (2d Cir. 1986).

In an effort to circumvent this clear RICO standing law, Beck asserted that his allegations fell within a narrow and limited exception to the derivative/no-standing rule. That exception permits shareholders and creditors to assert RICO claims where they suffer some "direct" injury that is "separate and distinct" from the injury suffered by the corporation or all stockholders-creditors

generally as a result of the corporation's insolvency. *See, e.g., Manson*, 11 F.3d at 1130-31; *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1279-80 (7th Cir. 1989).

Beck alleged that his "separate and distinct" injury was that he was fraudulently induced to purchase the SIG stock/debenture unit in a private offering. According to Beck, he "was told both orally and in writing" that he would continue to be SIG's CEO after the offering and that he purchased the SIG unit in reliance on this alleged promise. R5-163 at 7. However, as the district court found, "Beck offer[ed] no evidence at all – through affidavit, deposition transcript or otherwise by himself or anyone else that he orally was told that he would continue as CEO." R6-191 at 16.

Nor was there any written misrepresentation. Beck alleged that page 42 of the Private Placement Memorandum ("PPM") represented that he would continue as CEO after the offering; but the PPM said no such thing. It simply stated that "Robert A. Beck has served as President and as a director of the issuer since September 1983," and that "Mr. Beck is also *currently* Chief Executive Officer." R5-160-Exh.11 at 42 (emphasis added); R6-191 at 16. The district court found that the PPM "nowhere tells or promises Beck that he will continue as CEO of SIG; it merely lists him currently as CEO." The court also found that "Beck offer[ed] no other written evidence that he was told that he would continue as CEO." R6-191 at 16.

Moreover, Beck admitted that his CEO status was not material. He testified that, after learning in August 1986 that he was no longer CEO, he consciously decided to remain at SIG, believing he "had a great opportunity"

with a company he thought had a promising future. R6-165-Exh. B at 58. Additionally, Beck's own employment agreement, which he signed in June 1986 – two months before the private offering – merely promised him a five-year term as president; it made no promise that he would be CEO. Indeed, Beck conceded in his deposition that his employment agreement did not obligate SIG to keep him as CEO. R6-165-Exhs. A & B. The district court correctly concluded that Beck's CEO allegation was a "bald assertion" that was "insufficient to withstand a standing challenge on summary judgment." R6-191 at 16.

In view of the district court's analysis, Beck is simply wrong in asserting that the district court "failed to discuss the grounds for its rejection of" his claim for fraudulent inducement to purchase stock. Appellant's Br. ("App.Br.") at 40 n.5. The district court's discussion encompassed not only Beck's claim as a creditor for purchasing the $150,000 debenture but also his claim as a purchaser of $75,000 in stock, which he purchased along with the debenture in the August 1986 Private Placement. R6-191 at 16.

Beck does not challenge the district court's findings with respect to his CEO claim. Instead, he now argues that defendants fraudulently *concealed* their intention to remove him as CEO. App.Br. at 24. However, the "evidence" Beck submits does not support his allegation of nondisclosure.

First, he cites to the deposition of Theresa Waldron, a SIG employee, for the broad proposition that the "defendants" had decided prior to the private placement to

remove Beck as CEO. App.Br. at 7, *citing* R5-161-Exh.14 at 58-59. But the transcript reveals that Waldron merely gave hearsay testimony *that Ron Prupis* (another defendant) made an off-hand comment that "eventually he [Prupis] would be CEO." *Id.* at 59. This statement does not even implicate the Bellezza Group; nor is there is any proof that Prupis made this comment before Beck purchased his unit in August 1986.

Next, Beck alleges that defendants concealed a transaction in which Leonard Bellezza allegedly made a false promise to indemnify a contractor to enable that contractor to obtain bonds. App.Br. at 7-8. Beck submits no record evidence in support of this allegation, however, relying instead upon his pleadings. *Id., citing* R5-160-Exh. 1 (crossclaim) & Exh. 2 (RICO Case Statement). A party opposing summary judgment cannot rely on the bare allegations of his pleadings. Fed. R. Civ. P. 56(e). Rather, he must come forward with affidavits or admissible evidence tending to rebut defendants' right to summary judgment. *L.S.T., Inc. v. Crow*, 49 F.3d 679, 684 (11th Cir. 1995). Beck did not do that here.

In sum, as the district court recognized, Beck's fraud allegations regarding his August 1986 stock/loan investment are without factual foundation. Beck failed to create any genuine issue of material fact that he met the "separate and distinct injury" exception to RICO's derivative no-standing rule.

It is for this reason that the cases cited by Beck are inapposite. App.Br. at 26-29, 43. In all of those cases, the plaintiff proved that he was fraudulently induced to extend credit or to purchase stock, or that the defendant

used fraudulent means to avoid repayment of plaintiff's specific debt. *E.g., Ashland Oil*, 875 F.2d at 1280; *Ceribelli v. Elghanayan*, 990 F.2d 62 (2d Cir. 1993); *GICC Capital Corp. v. Technology Fin. Group*, 30 F.3d 289 (2d Cir. 1994). Here, however, there was no factual support for Beck's fraud allegations; his shareholder and creditor injuries were derivative, and he lacked RICO standing. His claims are derivative.

C. Beck's Stock Retention Claim Is Derivative.

Beck attempted to circumvent RICO standing limitations by asserting that defendants' alleged fraudulent misrepresentations caused him to "retain and forebear" from selling his SIG stock during 1987. App.Br. at 15. These allegations, however, do not establish any injury to Beck "separate and distinct" from the injury suffered generally by all of SIG's stockholders.

The district court held that Beck's "failure to sell" claim is nothing but a disguised derivative claim for stock diminution, given that all shareholders – not just Beck – were deprived of allegedly negative information about SIG. R6-191 at 18. Indeed, the courts unanimously agree that a "failure to sell" claim is a derivative claim for which an individual shareholder lacks RICO standing. *Chanoff v. U.S. Surgical Corp.*, 857 F. Supp. 1011, 1018, 1025 (D. Conn. 1994), *aff'd*, 33 F.3d 50 (2d. Cir.), *cert. denied*, 115 S. Ct. 667 (1994); *Arent v. Distribution Sciences, Inc.*, 975 F.2d 1370, 1372-73 (8th Cir. 1992); *Leach v. FDIC*, 860 F.2d 1266, 1267, 1273-74 (5th Cir. 1988); *Crocker v.* FDIC, 826 F.2d 347, 351 (5th Cir. 1987), *cert. denied*, 485 U.S. 905

(1988); *Schautteet v. Chester State Bank*, 707 F. Supp. 885, 890 (E.D. Tex. 1988).

The reason is that a failure to sell claim is "too speculative to state any injury to the shareholders, apart from a diminution in the value of their stock." *Crocker*, 826 F.2d at 350-51; *Chanoff*, 857 F. Supp. at 1018, 1025, *aff'd*, 33 F.3d 50 (2d Cir. 1994); *Schautteet*, 707 F. Supp. at 890; *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737-55 (1975) (Rule 10b-5 bars standing unless plaintiff actually bought or sold stock, because "failure to sell" claim is too speculative and would open floodgates to claims impossible to defend).

The courts further reason that a "failure to sell" claim would essentially permit an individual stockholder to unlawfully trade on inside information. As the Fifth Circuit explained in *Crocker*, the defendants' fraud causes the stock's value to be artificially inflated, and the inflated price is maintained only because of defendants' fraudulent concealment of financial information:

> It follows that, had this information been released, the stock price would have immediately and precipitously fallen. . . . Thus, there would have been no market for the stock at the artificially high price. Without such a market, the Crockers' envisioned "profit opportunity" evaporates into hardly more than an illusion.

Crocker, 826 F.2d at 351-52.

Thus, Beck's claim presents a "troublesome paradox": on the one hand he claims that the defendants' scheme caused his injury. On the other hand, without that scheme, he "could never have realized the artificially

high profit that [he] claim[s] to have unjustly lost." *Id.* at 352. Courts simply do not "recognize an injury based on a lost profit to which no one was lawfully entitled." *Crocker*, 826 F.2d at 351 & n.6; *accord Arent*, 975 F.2d at 1374; *Chanoff*, 857 F. Supp. at 1018.

D. Beck Lacks Standing to Assert His Guaranty Claim.

Beck alleged that his unrecouped attorneys' fees from the First Fidelity action constitute RICO damages flowing from his execution of the $7.5 million Guaranty. He was wrong. For three reasons, Beck lacks RICO standing to sue for damages resulting from his execution of the Guaranty.

(1) The Lack of Competent Evidence

In opposing summary judgment, Beck submitted no evidence to support his claim that the First Fidelity attorneys' fees exceeded the $425,000 he received from L2P2 in settlement of his legal malpractice claim. He relied solely upon an unsupported assertion in a footnote of his brief. Such unsupported assertions are incompetent to show injury to business or property, and cannot prevent entry of summary judgment. *See L.S.T., Inc. v. Crow*, 834 F. Supp. 1355, 1361 (M.D. Fla. 1993), *rev'd on other grounds*, 49 F.3d 679 (11th Cir. 1995); *Quest Exploration v. Transco Energy*, 24 F.3d 738, 742 (5th Cir. 1994).

(2) The Absence of Proximate Cause

Even assuming Beck sustained an injury, it was not proximately caused by any RICO violation. *Holmes*, 112 S. Ct. at 1318. Several Courts have discussed whether attorneys' fees constitute proximately caused RICO damage, and a clear rule has emerged: where legal fees are expended as an *"intended consequence"* or *"integral component"* of a defendant's racketeering activities, those fees may constitute RICO damages. But where "litigation (or its threat) was neither an *instrument of the racketeering activity* nor *a harm intended to the victim,"* the attorneys' fees are not recoverable, because they are not proximately caused by the predicate acts. *Lemelson v. Wang Laboratories, Inc.*, 874 F. Supp. 430, 433 (D. Mass. 1994) (collecting cases); *accord Miller Hydro Group v. Popovitch*, 851 F. Supp. 7, 13-14 & n.6 (D. Me. 1994) (attorneys' fees recoverable only when they "stem from actual RICO violations").

This rule is illustrated by the very cases Beck cites. In all of those cases, the plaintiff's attorneys' fees were recoverable only because they were incurred defending or prosecuting litigation that was an "integral component" of the defendants' RICO scheme. App.Br. at 31-32; *See Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1167 (2d Cir. 1993) (attorneys' fees recoverable because defendant committed bankruptcy fraud and mail and wire fraud specifically to avoid collection of judgment owed to plaintiff); *Bankers Trust v. Rhoades*, 859 F.2d 1096, 1105 (2d Cir. 1988) (attorneys' fees recoverable because they were incurred attempting to collect a debt that defendant was fraudulently avoiding through predicate

acts of bribery of judges, bankruptcy fraud and fraudulent lawsuits); *Malley-Duff & Assocs. v. Crown Life Ins. Co.*, 792 F.2d 341, 354-55 (3d Cir. 1986), *aff'd on other grounds*, 107 S. Ct. 569 (1987) (litigation expenses recoverable since they were caused directly by defendant's obstruction of justice in prior federal litigation); *Lemelson*, 874 F. Supp. at 432-33 ("the taxing of victims with the prospects of vexatious litigation is an *integral component* of the racketeering scheme") (emphasis added).

Conversely, courts have not permitted recovery of attorneys' fees and other incidental expenses that were incurred indirectly and that were not an "integral component" of the defendants' RICO scheme. For instance, in *Miller Hydro*, defendant fraudulently performed a construction contract to increase plaintiff's payments. When plaintiff refused to pay the inflated amounts, defendant filed a breach of contract suit, which plaintiff defended and won. Subsequently, plaintiff filed a RICO action, alleging as damages the attorneys' fees incurred in the first suit. The court dismissed the RICO claim, holding that the legal fees were not proximately caused by any *predicate acts*. Rather, the fees were incurred because of defendant's non-criminal act of filing the prior breach of contract action. 851 F. Supp. at 13-14 & n.6. *See also Willis v. Lipton*, 947 F.2d 998, 1000-01 (1st Cir. 1991); *Rylewitz v. Beaton Services, Inc.*, 698 F. Supp. 1391, 1395-96 (N.D. Ill. 1988), *aff'd*, 888 F.2d 1175 (7th Cir. 1989); *Capasso v. CIGNA Ins. Co.*, 765 F. Supp. 839, 842 (S.D.N.Y. 1991); *Doe v. Roe*, 756 F. Supp. 353, 360 n.11 (N.D. Ill. 1991).

Beck's attorneys' fees fall within the latter line of cases and are not compensable under RICO, since the Bellezza Group never used fraudulent litigation as an

"integral component" or "instrument" of its alleged RICO scheme. *Lemelson*, 874 F. Supp. at 433. Indeed, all nine SIG directors (including the four members of the Bellezza Group) signed the Guaranty. Obviously the last thing they intended was for litigation to ensue, especially litigation aimed at holding them liable under the Guaranty.

In fact, Beck's attorneys' fees were expended indirectly only after several other contingent events occurred. First, SIG's business declined. Second, SIG defaulted on the First Fidelity note. Third, SIG declared bankruptcy, preventing First Fidelity from collecting against the primary obligor. Fourth, First Fidelity sued all nine of the guarantors, including Beck. And finally, Beck defended that claim on the merits and asserted a malpractice claim against L2P2. Thus, Beck's attorneys' fees were incurred only after SIG went bankrupt and only because First Fidelity committed the non-predicate act of filing suit on the Guaranty. *See Miller Hydro*, 851 F. Supp. at 14 (no proximate cause because "legal fees stemmed from [defendant's] decision to file a breach of contract action").

Therefore, Beck has not proven that his First Fidelity attorneys' fees were proximately caused by a predicate act. *Pelletier*, 921 F.2d at 1497, 1499-1500, *Holmes*, 112 S. Ct. at 1318.

(3) The Absence of Any Fraud

Even if attorneys' fees were somehow theoretically compensable under the facts of this case, Beck's fraud claim was without merit. The alleged fraudulent inducements included: (a) alleged reliance on an allegedly

inflated financial projection or estimate; (b) alleged concealment of transactions between SIG/CPC and Chief Structures, a contractor; and (c) alleged concealment of defendants' alleged plans to terminate Beck. R5-138-Exh. B, ¶2a. vi., at 3-4. Beck's own deposition testimony confirmed that he was not deceived when he signed the Guaranty.

(a) Beck admitted that the allegedly false projection was given only to, and relied upon only by, First Fidelity in extending the $7.5 million loan to SIG. *Beck conceded that he never received the projection before signing the Guaranty.* R5-138-Exh. 15 at 120-21. Thus, Beck could not prove that he was the "target of the scheme to defraud," or that he "relied to his detriment on misrepresentations made in furtherance of that scheme." *Pelletier*, 921 F.2d at 1499-1500; *Kingston Square Tenants Ass'n v. Tuskegee Gardens*, 792 F. Supp. 1566, 1578 (S.D. Fla. 1992).

Beck's reliance upon *Warner v. Alexander Grant & Co.*, 828 F.2d 1528 (11th Cir. 1987), is misplaced. There, the Court held that Warner could sue directly only because he signed a guaranty in actual reliance on false financial statements *"directed to Warner personally." Id.* at 1531 (emphasis added). Here, by contrast, false financial information was not "directed to [Beck] personally" but rather was given to First Fidelity. Beck could not have relied upon a document he did not know existed when he signed the Guaranty.

(b) Beck alleged that he would not have executed the Guaranty had he known of the true nature of transactions involving Chief. App.Br. at 8-12. In 1987, SCI-Fla issued surety bonds to Chief, but Chief had difficulty

completing its construction jobs and paying its materialmen. SIG agreed to a workout whereby it loaned money to Chief to help complete those jobs. A Joint Venture Agreement was executed in September 1987 in which CPC, SIG's subsidiary, agreed to assist Chief in financing the construction projects and in obtaining new surety bonds. Beck contends that these loans should have been treated as claims or losses on the Insurance Subsidiaries' books, but the defendants allegedly treated them as "notes receivable" or assets. Beck contends that treating these loans as assets inflated SIG's financial condition. He says he was unaware of the joint venture and workout/loan transactions and that he never would have guaranteed the First Fidelity loan had he known of them. R5-138-Exh.3.

Beck's extensive deposition testimony, however, confirms that he had full knowledge of the Chief situation. He conceded that he was SIG's president and that he was responsible for financial matters, including preparing and submitting financial statements to regulators. R5-138-Exh.4; R6-165-Exh.A, ¶3.1(a). Beck also testified that he was on the management Claims Committee that assessed surety bond claims and established "loss reserves" on SIG's books. He admitted that he was aware when he signed the Guaranty that approximately $2 million was loaned by SIG to Chief and other contractors. R5-138-Exh.5. He also admitted that, in December 1987 before he signed the Guaranty, he had arguments with SIG principals in which he insisted that Chief transactions should be listed as losses or claims on SIG's financial statements. *Id.*

Beck further admitted to having substantial knowledge of the joint venture/workout arrangement among

SIG, Chief and CPC. He testified that from September to December 1987, he signed SIG checks totalling more than $321,000 payable to Chief, CPC or both. Beck also admitted that these checks contained the notations "joint venture" or "workout." R5-138-Exh.6; R6-165-Exh.F. He thus was forced to concede that he was aware, prior to signing the Guaranty, that the reason SIG was making advances to Chief was to help Chief complete its construction projects and pay its vendors, the usual indicators of a default. R5-138-Exh.7. Also, Beck admitted that SIG director Neil Prupis told him that the loans to Chief would continue to be made in the future. R5-138-Exh.8; R5-138-Exh.12.

Beck also alleged that he was unaware that Chief was being treated as a receivable/asset on SIG's books when in reality it was a claim/loss. This assertion too was specious. As SIG's president, Beck himself prepared and signed the September 1987 quarterly financial statements. R6-165-Exh. E. Moreover, Beck admitted that, in December 1987, he *believed* the Chief loans were claims or losses; obviously, then, he was not deceived by any suggestion to the contrary. R5-138-Exh.9. Moreover, in December 1987, the year-end financial statements had not even been prepared, so the Chief situation had not yet been finally classified when Beck signed his Guaranty. Whether Chief was an asset or a loss was purely an accounting issue that did not arise until 1988 when Deloitte Haskins & Sells, SIG's auditors, prepared SIG's 1987 year-end financial statement – months after Beck signed the December 1987 Guaranty. R5-138-Exh.11 (1987 year-end financials); R5-138-Exh.11 (Beck Dep. at 140-51). In fact, when Deloitte prepared SIG's 1987 year-end financials in May

1988, it properly classified the Chief transactions as claims. R5-138-Exh.11 at 8-10, 17.

Because Beck was armed with all of this knowledge when he signed the Guaranty, there was no merit to his claim that he was unaware of the Chief situation or of SIG's financial condition. Nor could he seriously argue that he relied on any misrepresentations or concealments. As this Court held in *Pelletier*, "when the plaintiff's evidence conclusively proves the opposite of his allegations, summary judgment in the defendant's favor is appropriate." 921 F.2d at 1507, 1509-10. In *Pelletier*, the Court dismissed a RICO claim because plaintiff's own deposition testimony showed that he entered the transaction "with his eyes wide open" and that he "did not rely on the alleged misrepresentations"; therefore, he could not prove that his injury was proximately caused by defendant's fraud scheme. As in *Pelletier*, Beck signed the Guaranty "with his eyes wide open." His own deposition testimony proved "the opposite of his allegations." *See* 921 F.2d at 1507; *see also Hibiscus Assoc. v. Board of Trustees*, 50 F.3d 908, 920 (11th Cir. 1995).[2]

(c) Finally, Beck alleged that defendants concealed their intention, supposedly formed in December 1987, to fire him as president. But Beck submitted no evidence

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[2] The courts have consistently dismissed RICO claims where the plaintiff failed to prove reliance. *E.g., Blount Fin. Servs. v. Walter E. Heller & Co.*, 819 F.2d 151, 153 (6th Cir. 1987); *Grantham & Mann v. American Safety Prods., Inc.* 831 F.2d 596, 606 (6th Cir. 1987); *Mid-State Fertilizer*, 877 F.2d at 1337; *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1312 (2d Cir. 1990).

that any member of the Bellezza Group had decided in December 1987 to fire him. Again on appeal, he relies on his own pleadings and on irrelevant deposition transcripts containing hearsay. App.Br. at 14.

For example, Beck relies on Exhibit 20, Ron Prupis's affidavit from another lawsuit. That affidavit merely states that at a December 1987 meeting a *Smith Barney employee* suggested that Beck should be terminated. Prupis did not say that the Bellezza Group agreed to terminate Beck or that the board of directors made a decision. Beck also refers to Exhibit 36, the deposition testimony of former SIG employee Paul Price. But Price merely gave hearsay testimony that Judy Weaver (another SIG employee) told him Beck would be terminated. Nowhere was it indicated whether anyone had made an actual decision to fire Beck, or whether Weaver was merely relaying a rumor. More importantly, Price's testimony simply does not say that any member of the Bellezza Group had formed an intent in December 1987 to fire Beck. The rest of the cited exhibits do not even mention the Bellezza Group; they all imply that *Ron Prupis* wanted to take control of SIG for his own personal reasons. App.Br. at 14, *citing* Exh. 16, 18, 36-38.

Thus, all that can be said of Beck's factual references is that there were rumors – not secret decisions – of Beck being fired. Those rumors did not even implicate the Bellezza Group and cannot be traced to December 1987.

* * *

In sum, Beck has not shown that the First Fidelity Guaranty proximately caused him any injury to business or property. Nor has he produced any record evidence to

show that he was fraudulently induced to sign the Guaranty. He therefore lacks RICO standing.

E. Beck Lacks Standing as a Whistleblower.

Beck's next claim is that he was wrongfully terminated as SIG's president in May 1988 in violation of RICO's conspiracy provision, §1962(d). To support this claim, Beck alleges that defendants hatched a scheme in 1986 to create fraudulent causes for a termination that occurred *in 1988*, to brand him as a scapegoat for their alleged illegal activities, and to prevent him from blowing the whistle on their alleged illegal activities. R5-138-Exh.A, ¶¶43-60; Exh.B, ¶4.a.i. Even if these allegations are true, however, Beck lacks RICO standing under §1964(c) because his loss of employment was not caused directly by any predicate acts.

1. Eleventh Circuit Precedent Bars Beck's Claim.

As the district court recognized, the Eleventh Circuit has held that an employee terminated for blowing the whistle does not have RICO standing. The Court reasoned that plaintiff's loss of employment was not proximately caused by a predicate act and therefore did not satisfy §1964(c). R6-191 at 20-21; *Morast v. Lance*, 807 F.2d 926, 933 (11th Cir. 1987); *see also O'Malley v. O'Neill*, 887 F.2d 1557, 1561 (11th Cir. 1989); *Pelletier*, 921 F.2d at 1499-1500. Therefore, under Eleventh Circuit precedent, the district court properly dismissed Beck's whistleblower conspiracy claim as a matter of law.

Beck attempts to distinguish *Morast*, but this attempt is unavailing. Beck argues that the plaintiff in Morast was fired solely for *reporting* a prior irregular transaction, but that the Court suggested that plaintiff might have succeeded had he alleged termination because of a *refusal to participate* in the illegal scheme. App.Br. at 33-34, citing *Morast*, 807 F.2d at 933 n.8. In contrast, he says, he alleged that he was fired because he refused to participate in defendants' activities. *Id.*

The district court held that there was "no basis on which to distinguish this case from *Morast* and *O'Malley*," because "the decision to fire Beck was tangentially related to any RICO violations that may have occurred." R6-191 at 21. The court was correct. In *O'Malley*, this Court held there is no difference between a discharge for refusal to participate and a discharge for reporting illegal activity, since "in either case the injury does not flow directly from the predicate acts." 887 F.2d at 1562. *See Cullom v. Hibernia Nat. Bank*, 859 F.2d 1211, 1217 (5th Cir. 1988). Thus, Beck's argument ignores the requirement that plaintiff's injury be caused directly by predicate acts of racketeering, rather than by defendant's non-criminal "other conduct." *Pelletier*, 921 F.2d at 1499; *see Sedima*, 473 U.S. at 496-97.

Because the act of firing Beck was not a predicate act, the district court was correct in dismissing Beck's whistleblower conspiracy claim.

2. Section 1962(d) Requires Predicate Act Injury.

Recognizing that Eleventh Circuit precedent bars his RICO conspiracy claim, Beck asks this Court to ignore that precedent and apply the minority rule, which permits a whistleblower to assert a RICO conspiracy claim. App.Br. at 36-40, *citing Shearin v. E.F. Hutton Group. Inc.*, 885 F.2d 1162 (3d Cir. 1989); *Schiffels v. Kemper Fin. Services, Inc.*, 978 F.2d 344 (7th Cir. 1992). *Shearin* and *Schiffels* held that a RICO plaintiff has standing to sue for a conspiracy if he was injured by an overt act committed in furtherance of the conspiracy, even if that overt act was not a predicate act. But a clear majority of the Circuits are in accord with this Circuit in holding that a plaintiff has RICO conspiracy standing only if he was injured by a predicate act. *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 48 (1st Cir. 1991); *Hecht v. Commerce Clearing House*, 897 F.2d 21, 25 (2d Cir. 1990); *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1344-45 (2d Cir. 1994); *Cullom v. Hibernia Nat. Bank*, 859 F.2d 1211, 1217-18 (5th Cir. 1988); *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir. 1993); *Reddy v. Litton Industries*, 912 F.2d 291, 295 (9th Cir. 1990).

There is no good reason to depart from *Morast* and *O'Malley*. But Beck asks this Court to overrule that controlling precedent, arguing that a predicate act requirement contravenes RICO's plain meaning. Since §1964(c) provides standing to anyone injured by "a violation of §1962," and since §1962(d) prohibits conspiracies, Beck argues that any person harmed by a conspiracy should have RICO standing, whether or not the injury resulted

from a predicate act. App.Br. at 36-38. Beck's interpretation of the statute is overly literal and mechanistic, however, because it reads §1962(d) in a vacuum without reference to RICO as a whole. Indeed, his interpretation ignores several canons of statutory construction.

First, even in reading a statute's "plain meaning," a court must do more than view subsections in isolation. Rather, the court must derive meaning from context, and must "look to the provisions of the whole law, and to its object and policy." *United States Nat. Bank of Oregon v. Independent Ins. Agents*, 113 S. Ct. 2173, 2182 (1993); *accord In re Rufener Constr., Inc.*, 53 F.3d 1064, 1066-67 (9th Cir. 1995); *Homeland Stores, Inc. v. RTC*, 17 F.3d 1269, 1273 (10th Cir. 1994); *United States v. Chandler*, 996 F.2d 1073, 1084, *reh'g en banc denied*, 5 F.3d 1501 (11th Cir. 1993).

Second, if reliance on the statute's literal language would "defeat the plain purpose of the statute," the court should go beyond that literal language and follow the statute's purpose. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983); *see United States v. American Trucking Ass'n*, 310 U.S. 534 (1940); *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995) (rejecting literal reading of Bankruptcy Code §523 that would have contravened the Code's underlying purpose).

Finally, a statute should be construed so that all its provisions are given effect and so that no part will be rendered inoperative or superfluous. *Homeland Stores*, 17 F.3d at 1273. When two subsections of legislation are in apparent conflict, the court should attempt to reconcile them to carry out the statute's overall purpose, "instead of allowing one provision effectively to nullify the other

provision." *United States v. Gordon*, 961 F.2d 426, 431 (3d Cir. 1992); *see Love v. Thomas*, 858 F.2d 1347, 1354 (9th Cir. 1988); *Herriman v. Conrail, Inc.*, 887 F. Supp. 1148, 1154 (N.D. Ind. 1995); *Moncrief v. Williston Basin*, 880 F. Supp. 1495, 1517 (D. Wyo. 1995).

Here, Beck's theory is inherently flawed because it suffers from tunnel vision: it attempts to construe two discrete provisions out of context and without regard to RICO's overall purpose. In contrast, predicate act requirement furthers RICO's overall purpose by narrowing the focus of §1962(d) suits "to the *specific racketeering activity that lies at the heart of the RICO statute.*" *Bowman*, 985 F.2d at 388 (emphasis added) As the First Circuit explained,

> Congress painstakingly enumerated a complete list of predicate acts in 18 U.S.C. § 1961(1). For judges, under a conspiracy rubric, to allow RICO damages for an injury caused other than by an enumerated predicate offense would be tantamount to rewriting the statute.

Miranda, 948 F.2d at 48; *see also Hecht*, 897 F.2d at 25 (Congress did not "deploy RICO as an instrument against all unlawful acts").

Beck's expansive theory would render most of RICO meaningless, because it would allow RICO plaintiffs, through "artful" pleading, to "circumvent the predicate act requirement applicable to suits based on §1962(a)-(c) simply by alleging a conspiracy to commit those same substantive acts." *Bowman*, 985 F.2d at 388. Under Beck's theory, RICO would be transformed into a federal super-tort statute, with RICO plaintiffs able to recover for mere "overt" or tortious acts. Congress did not intend to criminalize mere tortious activity under the rubric of a RICO

"conspiracy." *See Willis v. Lipton*, 947 F.2d 998, 1001 (1st Cir. 1991); *Miranda*, 948 F.2d at 49.

In short, under Beck's approach, RICO would be turned on its head, with the conspiracy provision eclipsing the three substantive racketeering provisions that inform it. This would "defeat the plain purpose of the statute." *Bob Jones Univ.*, 461 U.S. at 586; *American Trucking Ass'n*, 310 U.S. at 543.

Conversely, the predicate act requirement – accepted by this Court and a majority of other Circuits – effectively reconciles the potential conflict between §1962(d) and §1964(c). Contrary to Beck's assertion that the predicate act requirement renders §1962(d) superfluous, that requirement leaves open substantial liability under the civil conspiracy provision. This is illustrated by a simple hypothetical.

Suppose five individuals conspire to direct a pattern of racketeering activity at a particular plaintiff, but only one of them actually commits the predicate acts. Under those facts, only the person actually committing the predicate acts can be liable under §1962(c), because the other four did not actually "conduct the enterprise's affairs" through a pattern of racketeering activity. 18 U.S.C. §1962(c); *see Aetna Cas. & Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1558, 1560 (1st Cir. 1994); *United States v. Private Sanitation*, 793 F. Supp. 1114, 1140-41 (E.D.N.Y. 1992). However, those four persons would still be liable under §1962(d), since they "conspire[d] to violate" §1962(c), and the plaintiff was injured by the pattern of racketeering committed by the fifth conspirator. 18 U.S.C. §1962(d); *see Aetna*, 43 F.3d at 1562-63 (conspirators are jointly and

severally liable for the racketeering conduct of other conspirators, even if some conspirators are unaware of "entire conspiratorial sweep").

Thus, under RICO's civil conspiracy provision, Congress's likely intent was to provide a procedural mechanism for holding all conspirators vicariously liable for the predicate acts committed by one of them. *See Aetna*, 43 F.3d at 1562-63; *Medallion TV Enter. v. SelecTV of Calif.*, 627 F. Supp. 1290, 1298 (C.D. Cal. 1986), *aff'd*, 833 F.2d 1360 (9th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989).

In sum, sections 1964(c) and 1962(d) can be harmonized without any RICO provision being rendered superfluous. Whereas Beck's approach would eviscerate sections 1962(a)-(c) by allowing RICO plaintiffs to recover for mere tortious acts; the predicate act requirement maintains the integrity of §§1962(a)-(c) while leaving intact substantial conspiracy liability under §1962(d) for persons not liable under §1962(a)-(c).

3. In Any Event, Beck's Loss of Employment Was Not Proximately Caused by any RICO Violation.

Even if there were some theoretical basis on which to deviate from *Morast* and *O'Malley*, Beck would still be unable to show that his loss of employment was proximately caused by an overt act in furtherance of the alleged RICO conspiracy. Indeed, in the very case relied upon by Beck, the court followed the minority view but still dismissed the plaintiff's whistleblower conspiracy claim, because her loss of employment was not proximately caused by a conspiracy to violate RICO. *Schiffels*,

978 F.2d at 353. Here, the record is devoid of evidence tending to prove that Beck was terminated because he posed a threat as a whistleblower.

Beck's conspiracy allegation is centered on defendants' alleged May 1988 agreement with Firemark to create false causes for Beck's termination. The only evidence Beck submitted to support this allegation is that defendants supposedly held clandestine meetings at which they decided to retain Firemark, and that Firemark wrote a report allegedly falsely impugning Beck's managerial abilities. App.Br. at 16.

Regarding the supposed secret meetings, the only evidence Beck submitted consisted of hearsay and innuendo. As he did in the district court, Beck refers only to Exhibits 36 (Price Dep.), 39 (Sendaydiego Dep.), 42 (Weaver Dep.), 43 (Petigrow Dep.), and 12 (Beck Dep.), *none of which discuss any meetings involving the Bellezza Group*. Instead, the cited exhibits refer to hearsay statements of Judy Weaver, Ron Prupis and employees Price and Sendaydiego about Beck's rumored termination and his lesser job responsibilities. None of the transcripts provide evidence that *the Bellezza Group* created *false causes* for Beck's termination. *See Plaisance v. Travelers Ins. Co.*, 880 F. Supp. 798, 804 (N.D. Ga. 1994), *aff'd*, 56 F.3d 1391 (11th Cir. 1995) (plaintiff cannot avoid summary judgment by relying on "speculation and unsubstantiated hearsay").

There is also no exhibit addressing any secret meeting at which Firemark was hired and told to create false causes for Beck's termination. The cited exhibits do not even mention Firemark. Indeed, the New Jersey district

court dismissed Beck's claim against Firemark, finding no evidence of any conspiracy involving Firemark. R5-138-Exh. L. The New Jersey district court found that there was nothing false about the Firemark report:

> [T)he questionable conduct described in the Report is attributed solely to neither Beck nor any other member of management. Additionally, *it is illogical for Beck to claim that the Report was false when it documents the same misconduct that Beck asserts occurred at SIG.*
>
> * * * *
>
> Although the Report does recommend Beck be terminated, it does not explicitly attribute any wrongdoing to Beck alone. If anything, the Report suggests that much of the management of SIG was to blame. The Report recommends termination or investigation of numerous officers or directors in addition to Beck.

R5-138-Exh.L at 44-45, 51 (emphasis added).

Since Beck's conspiracy claim against Firemark was dismissed five years ago, the only new evidence Beck has proffered of Firemark's purported falsification of grounds for his termination is the double hearsay testimony of a former Firemark employee, Bonnie Smith. App.Br. at 16; R5-162-Exh.44. Smith stated that Michael Morrissey, a Firemark principal, told her that Firemark recommended Beck's termination because Joanne Morrissey, Firemark's president, wanted Beck's job. *Id.* Even if this were true, the inference Beck attempts to draw from it – that the Bellezza Group wanted to fire Beck because of his whistleblowing activities – is absurd. Whatever may have

been Joanne Morrissey's career motivations, they have nothing to do with RICO.

Thus, Beck cannot prove that defendants terminated him because of his whistleblowing activities. As in *Schiffels*, Beck cannot prove that his loss of employment was proximately caused by any RICO conspiracy, and the district court properly dismissed his whistleblower-conspiracy claim.

POINT II

BECK CANNOT PROVE A PATTERN OF RACKETEERING ACTIVITY.

The district court declined to address whether Beck could prove a pattern of racketeering activity. R6-191 at 11. The fact was, however, that there was no such pattern. Therefore, summary judgment can be affirmed on the alternative ground that Beck could not prove a pattern of racketeering activity.

A "pattern" requires "at least two acts of racketeering activity." 18 U.S.C. §1961(5). Two isolated predicate acts do not constitute a "pattern." *Sedima*, 473 U.S. at 496 n.14. Rather, to establish a pattern, the plaintiff must prove that the predicate acts were both related and continuous, that is, that they either "amount to" or "pose a threat of continued criminal activity." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). Continuity is a "temporal concept" because RICO is concerned primarily with "long-term criminal conduct." *Id.* at 241-42; *see Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 970-71 (11th Cir. 1986). Thus, predicate acts extending over a few weeks or months, and threatening no future criminal

conduct, do not constitute a pattern. *H.J., Inc.* 492 U.S. at 242.

Beck asserts that the 50 predicate acts he pleaded in his crossclaim and RICO Case Statement form a pattern. App.Br. at 16-17; R5-163 at 5. But even assuming those 50 predicate acts comprise a pattern *against third parties* such as SIG, contractors and First Fidelity, Beck cannot rely on that pattern to support his own RICO claim, because the separate frauds allegedly directed against him are wholly unrelated to that pattern.

In *H.J., Inc.*, the Supreme Court defined relatedness to mean "criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics, and are not *isolated events.*" *H.J., Inc.*, 492 U.S. at 240 (emphasis added). In applying this test, the courts have made clear that a RICO plaintiff cannot, for purposes of establishing a pattern, latch onto wholly unrelated predicate acts targeting third parties.

For instance, in *Vild v. Visconsi*, 956 F.2d 560 (6th Cir. 1992), the plaintiff alleged two different categories of predicate acts, as Beck does here. The first type of conduct involved mail and wire fraud and extortion "directed at the plaintiff," who was fraudulently induced to enter a joint venture to market real estate interests in a resort. The second type of conduct involved various wrongs "directed at others," such as real estate purchasers and state governments. *Id.* at 566. The Sixth Circuit held that these two types of predicate acts had different purposes, different results and different victims; therefore, they did not satisfy *H.J., Inc.'s* relatedness

prong. *Id.* at 566-67. The Court reasoned that the plaintiff "may not use unrelated predicate acts that allegedly may have harmed ultimate purchasers and other third parties not similarly situated to the plaintiff." *Id.* at 567.

The same is true here. Beck cannot use the "unrelated" 50 predicate acts, which he concedes caused him no damage and which he admits were directed at "third parties," to satisfy the pattern requirement. *Vild*, 956 F.2d at 567; *see also Heller Financial, Inc. v. Grammco Computer Sales*, 71 F.3d 518, 524-25 (5th Cir. 1996) (no relatedness where two categories of predicate acts had different purposes, results, and methods of commission); *Shearin*, 885 F.2d at 1168 (plaintiff could not recover for fraudulent hiring, because that predicate act was "dissimilar" from securities fraud committed against employer's customers).

Because Beck cannot rely on the 50 pleaded predicate acts to establish a pattern, he must establish that the August 1986 stock/debenture purchase and the December 1987 Guaranty establish their own separate pattern of racketeering. However, these two alleged predicate acts are unrelated. "The relatedness inquiry focuses on the interrelationship of charged RICO predicates, thereby ensuring that a person is not subjected to sanctions for committing *two widely separated and isolated criminal events.*" *Heller*, 71 F.3d at 524 (emphasis added).

Here, the August 1986 private offering was completely unrelated to the December 1987 First Fidelity loan; those transactions were "two widely separated and isolated" events occurring 16 months apart and having nothing in common. *Heller*, 71 F.3d at 524; *see Feinstein v.*

Resolution Trust Corp., 942 F.2d 34, 44-45 (1st Cir. 1991) (no pattern because real estate transactions occurring two years apart were unrelated). Although these acts involve similar participants and a similar victim, RICO's relationship prong requires more than a mere "articulable factual nexus." *Heller*, 71 F.3d at 525. There is no real nexus between the private offering and the Guaranty, other than the fact that they both involved SIG and Beck. *See Vild*, 956 F.2d at 567-68 (no relatedness even though predicate acts involved similar participants); *Feinstein*, 942 F.2d at 44-45 (no relatedness even though predicate acts involved similar victims and participants).

Finally, it goes without saying that neither the stock/debenture purchase nor the First Fidelity Guaranty individually amount to a pattern. Both were short-lived schemes lasting no more than a few days or weeks. *H.J., Inc.*, 492 U.S. at 242. Because RICO prohibits only "long-term" racketeering, a single fraudulent scheme directed against a single victim does not amount to a pattern. *See Aldridge v. Lily-Tulip, Inc.*, 953 F.2d 587, 592-93 (11th Cir. 1992) (single scheme lasting only six months did not constitute pattern).

POINT III

THE PENDENT CLAIMS WERE PROPERLY DISMISSED.

Beck argues that the district court abused its discretion by refusing to exercise supplemental jurisdiction over his state law claims, because those claims are now time-barred under Florida law. There was no abuse of discretion.

Beck began this litigation's tortuous journey in 1989 by filing suit in Florida state court. He later voluntarily dismissed that suit and reasserted it in the New Jersey district court, in an obvious attempt to forum-shop and in clear violation of the forum selection clause of his employment agreement. Once the case was transferred to the federal court in Florida in 1991, Beck allowed three years to elapse without moving the litigation forward; he did not file his RICO Case Statement until 1994. *See* R1-1; R1-25. He then forced defendants to engage in an intense period of discovery to defend against the 50 predicate acts he pleaded – acts that he ultimately admitted did not cause him any RICO injury.

In these circumstances, any statute of limitations problem Beck may have is entirely of his own doing. As the Ninth Circuit stated in a similar situation: "[O]nce a plaintiff initiates multiple litigation by filing his state claims in both state and federal courts, it is not an abuse of discretion for the federal court to decline to consider a state court time-bar as a determinative factor in deciding whether to retain jurisdiction over pendent claims after dismissing federal claims." *Notrica v. Board of Supervisors*, 925 F.2d 1211, 1215 (9th Cir. 1991). "It is not the function of a federal court to rescue a party from the danger of limitation by permitting the litigation of inappropriate matters in federal court." *Quality Foods v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 1000 (11th Cir. 1983).

CONCLUSION

For the foregoing reasons, the judgment entered below should be affirmed.

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CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via Federal Express on March 1, 1996 to all counsel on the attached service list.

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO.: 95-4844

ROBERT A. BECK, II,

Plaintiff, Appellant,

vs.

RONALD M. PRUPIS, LEONARD BELLEZZA, ERNEST J. SABATO, WILLIAM PAULUS, JR., HARRY OLSTEIN, FREDERICK C. MEZEY, BYRON L. SPARBER, JOSEPH S. LITTENBERG,

Defendants, Appellees.

_____/

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

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CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in this brief is courier 12 pt.

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I. THE NEW JERSEY GROUP'S STATEMENT OF FACTS DISTORTS THE RECORD.

The Statement of Facts contained in the New Jersey Group's Answer Brief omits material evidence and misstates other evidence, creating a distorted statement of the record. For the most part, the Statement of Facts in

Beck's Initial Brief corrects the distortions, and will not be repeated here. In other instances, however, additional mention is necessary.

First, the New Jersey Group's Answer Brief at 12-14 contains a glaring misrepresentation – the New Jersey Group states that, until Beck's Opposition to the Motion for Summary Judgment, Beck argued that he was directly injured by the predicate acts targeted at third parties and, then, changed his position to that "[the 50 predicate acts pled in his complaint and RICO Case Statement] were 'plead in the instant case merely to satisfy RICO's pattern requirements." *Id.* at 13.

These unambiguous statements are simply false. From the very outset of this case, Beck has consistently maintained in clear statements that the Complaint alleged certain predicate acts committed against Beck *and* that the remaining predicate acts were merely plead to satisfy RICO's pattern requirement. First, in Beck's responses to the New Jersey Group's Motion to Dismiss (which was filed twice – once in New Jersey in *1991* and once in Florida in *1994*), Beck detailed this position, stating:

> In the instant case, the focus of the substantive claims is the damages Beck suffered by reason of being fraudulently induced to guaranty and extend loans. . . . *The remaining predicate acts are plead solely to fulfil the pattern requirement* (emphasis supplied).

R1-28-19; *see also* R5-138-Ex L at 10-11; R7-222 at 1-3. Similarly, Beck's RICO Case Statement made clear that Beck's claim was for the injuries he particularly suffered (set forth in section 2 of that document), and that the

remaining predicate acts (set forth in section 3) were merely present to establish pattern (R1-25).

The New Jersey Group also selectively quotes from Beck's nine-day deposition, arguing that Beck conceded that his injuries were derivative. Answer Brief at 7-12. This, again, is simply untrue. The portions of the deposition quoted by the New Jersey Group refer only to the demise of SIG, rather than to the fraudulent inducement of Beck. When the questioning related to the predicate acts against Beck and his injuries therefrom, however, Beck testified:

> Q. Were you hurt because you lost the value of your investment in SIG? Is that how you were hurt as a result of what you are telling us?
>
> A. I was hurt because information was withheld from me and had I had that information I could have prevented losses to myself and to others. I could have prevented the loss on signing the First Fidelity guarantee. I could have prevented the loss that I suffered due to the loss of my employment. I could have prevented the loss on the value of the stock. I could have prevented the loss that came about from the unsecured loan.
>
> I could have prevented all the damages had all these things that have been withheld from me not been withheld from me.

R5-160-Ex 9 at 33-34; *see also* R5-160-Ex 10 at 72-73 ("This was vital information which was withheld from me [Beck]."); R5-161-Ex 18 (detailing Beck's direct injuries).

II. BECK HAS STANDING TO PURSUE HIS SHAREHOLDER AND CREDITOR CLAIMS.

In its Answer Brief at 22, the New Jersey Group concedes that, under the well-established exception recognized by this Circuit, creditors have standing to sue for injuries caused by a fraud directly perpetrated upon them, even if the corporation has suffered an identical injury for which it has a similar right of recovery. *See also* Initial Brief at 24-30. The New Jersey Group also concedes that a shareholder has standing to sue where he demonstrates the violation of an independent duty owing to that shareholder, even if the wrongdoer's actions have simultaneously harmed both the shareholder and the corporation.[1] *See also* Initial Brief at 40-43. The New Jersey Group does not challenge that Beck's allegations are sufficient to bring them under the exceptions, but instead argues only that the evidence is insufficient. The record, however, belies this argument.

First, the New Jersey Group contends that Beck admitted that the misrepresentation/fraudulent omission that he would continue as CEO was not material because he made a conscious decision to remain at SIG after he was removed from this position. The New Jersey Group's citation to the record, R6-165-Ex B at 58, however, does not support this proposition. Regardless, Beck testified that, if not for his belief that he would continue to be

---

[1] Thus, the New Jersey Group's citation of cases holding that creditors and shareholders may not bring derivative claims is misplaced, as Beck's fraudulent inducement claims assert violations of direct and independent duties owed to Beck personally, not derivatively.

CEO, he would not have extended the loan or purchased the stock (R5-161-Ex 13 at 63-64). The fact that Beck may have decided to try to make the best of things and honor his contract by staying on after he was removed as CEO does not conflict with this testimony. "A fact is material if but for the alleged non-disclosure or misrepresentation the complaining party would not have entered into the transaction." *Hauben v. Harmon*, 605 F.2d 920, 924 (5th Cir 1979). The issue of the materiality of an alleged non-disclosure or misrepresentation is a question of fact for the jury, especially where the evidence on the issue is, as here, controverted. *Id.*

The fact that Beck was not guaranteed that he would forever hold the CEO position is also not dispositive. A jury could reasonably find that Beck was entitled to believe that he had been given an opportunity at the CEO position, even if his employment agreement did not mandate such an outcome, especially given that SIG's By-laws mandated that SIG's President would also be its CEO (R5-162-Ex 45 at §4.4). When the evidence is controverted, the issue of reasonable reliance on false representations or omissions is a question of fact for the jury, not one to be determined on summary judgment. *Wolff v. Allstate Ins. Co.*, 985 F.2d 1524, 1531 (11th Cir. 1993); *Souran v. Travelers Ins. Co.*, 982 F.2d 1497, 1505 (11th Cir. 1993).

Next, for the first time on appeal, the New Jersey Group challenges the evidence of the fraudulent concealment of its plans to remove Beck as CEO. These evidentiary objections have been waived. *See, e.g., Munoz v. International Alliance of Theatrical Stage Employees*, 563 F.2d 205, 297 n.1 (5th Cir. 1977) (waiver of objections to evidence at summary judgment is subject to same rules

applicable at trial); *Davis v. Howard*, 561 F.2d 565, 569-70 (5th Cir. 1977) (unchallenged evidence otherwise inadmissible may be considered on summary judgment); *Lawson v. American Motorists Ins. Corp.*, 217 F.2d 724, 726 (5th Cir. 1954) (evidentiary objections not raised to district court are waived); *Auto Drive-Away Co. of Hialeah, Inc. v. I.C.C.*, 360 F.2d 446, 448-49 (5th Cir. 1966) (objections to formal defects of evidence cannot be raised for first time on appeal); *In re Assoc. Bicycle Service, Inc.*, 128 B.R. 436, 441-42 (Bnkr. N.D.Ind. 1990) (same).

Moreover, Waldron's deposition, challenged as hearsay, reflects a statement made by R. Prupis, a co-defendant and alleged co-conspirator. Accordingly, the statement would be admissible, even if there had been an objection below. *See* Fed.R.Evid. 801(d)(2); *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1563 (11th Cir. 1991) (statement by party is not hearsay); *U.S. v. McDonald*, 935 F.2d 1212, 1220 (11th Cir. 1991) (co-conspirator statements admissible).

The New Jersey Group fails to even mention the other proof presented by Beck in support of this point: that within a week of the Private Placement Offering's closing, Beck was ousted from the CEO position (R5-161-Ex 14 at 16, 49-50; R5-161-Ex 16 at 24-25; R5-161-Ex 17 at 148-50). This action evidences a prior agreement and intention to strip Beck of the CEO title – an agreement hidden from Beck.

Also for the first time on appeal, the New Jersey Group attacks the evidence presented by Beck that the New Jersey Group fraudulently concealed from Beck the

fraudulent representations they made to indemnify contractors. The New Jersey Group contends that Beck does not support these allegations with record evidence but merely relies on his pleadings. This contention is false. First, the pleadings cited were verified, and, as such, can be considered as summary judgment evidence. *Resolution Trust Corp. v. Starkey*, 41 F.3d 1018, 1024 (5th Cir. 1995); *Munz v. Michael*, 28 F.3d. 795, 798 (8th Cir. 1994) ("[a] verified complaint is the equivalent of an affidavit for summary judgment purposes."). The New Jersey Group also chooses to ignore the evidence submitted by Beck on this issue beyond these verified pleadings. *See* R5-160-Ex 9 at 32-33; R5-161-Ex 34 at 107-15; R5-162-Ex 54 at 2-3; R5-161-Ex 20 at 2-3; R5-161-Ex 30 at 4, 6.

III. BECK HAS STANDING TO ASSERT HIS PERSONAL GUARANTY CLAIM.

The New Jersey Group's first argument on this point, that Beck has no evidence that his damages exceeded the $425,000 he received in settlement, improperly places burdens on Beck. The party moving for summary judgment has the initial burden of demonstrating that no genuine issues of material fact remain to be tried. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Id.* "[U]nless the movant meets its burden . . . the obligation of the opposing party does not arise even if no opposing evidentiary material is presented by the party opposing the motion." *Id.* at 607.

"Even after *Celotex*, it is never enough simply to state that the non-moving party cannot meet its burden at trial." *Id.*

Here, the evidence presented by the New Jersey Group failed to demonstrate the absence of questions of fact. The Settlement Agreement, the sole evidence presented by the New Jersey Group on this issue, merely establishes that $425,000 was paid to settle numerous claims. Moreover, on its face, the Settlement Agreement raises issues of fact relating to allocation of the proceeds. Accordingly, the burden never shifted to Beck.

Had the burden shifted, Beck would have filed evidence relating to the amount of his fees. In fact, the invoices that demonstrated that the damages exceeded $800,000 were produced to the New Jersey Group. As this evidence was already in its hands, the New Jersey Group chose not to challenge Beck's statement that the fees exceeded $800,000 in the lower court. Any objections were thereby waived. *See supra* at 4-5. The New Jersey Group should not be allowed to benefit from not making an argument below. *See Goka v. Bobbitt*, 862 F.2d 646, 650 (7th Cir. 1988) (summary judgment motion improper when party obtained knowledge through discovery or otherwise that a material factual dispute exists but hopes opposing party will be unable to meet its burden).

The New Jersey Group next challenges the recovery of legal fees as RICO damages. *See* Answer Brief at 28. The true holding of most of the cases cited, however, is that legal fees may constitute RICO damages if proximately caused by a RICO violation. *See* Initial Brief at 31; *especially Alexander Grant & Co. v. Tiffany Ind.*, 742 F.2d 408, 411 (8th Cir. 1984), *vacated but readopted in*, 770 F.2d

717 (1985) (legal fees resulting from predicate acts recoverable under RICO even if not an intended consequence or integral component of scheme).

Proximate cause does not mean the "sole cause," but "[i]nstead, a factor is a proximate cause if it is 'a substantial factor in the sequence of responsible causation." *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir.), *modified*, 30 F.3d 1347 (1994), *cert. denied*, 115 S.Ct. 900 (1995). "But-for" causation coupled with reasonably foreseeable harm to the plaintiff is sufficient to establish proximate cause. *See, e.g., Tieder v. Little*, 502 So.2d 923, 925-26 (Fla. 3d DCA 1987). "It is not necessary . . . that the defendant foresee the exact sequence of events which led to the [harm] sued upon; it is only necessary that the general type of [harm] which has occurred was within the scope of the danger created by the defendant. . . . " *Id.* at 926. Beck's attorneys' fees damages were, thus, proximately caused by the New Jersey Group's RICO violations. When the New Jersey Group fraudulently induced Beck to guaranty the loan, it was foreseeable that Beck would have to eventually expend attorneys' fees defending against a lawsuit. This is especially true, given that 1) it was the New Jersey Group's RICO conduct that eventually caused SIG's collapse; and 2) Beck had a duty to mitigate his damages. *See Bieter Co. v. Blomquist*, 987 F.2d 1319, 1329 (8th Cir.), *cert. denied*, 114 S.Ct. 81 (1993).

Moreover, the New Jersey Group's argument would effectively nullify this Court's decision in *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1531 & n.2 (11th Cir. 1987), which conveyed RICO standing to persons fraudulently induced into entering a guaranty. Such standing

would be illusory if denied to victims successful in mitigating their damages, as their only remaining damages may well be the costs of that mitigation.

The New Jersey Group also argues that Beck failed to present any competent evidence of fraud. First, the New Jersey Group completely ignores Beck's evidence supporting his argument that the Group fraudulently concealed from Beck the illegal manner in which SIG was operated (extortion of contractors), and that had this information not been secreted from Beck, he would not have entered the Guaranty. *See* Initial Brief at 13-14. This is an independent factual basis for Beck's claim which, standing alone, should defeat summary judgment.

Regardless, the New Jersey Group's attacks on Beck's other factual support distort the record. The New Jersey Group erroneously argues that Beck conceded that he never received *any* false financial projections from them prior to signing the guaranty. The only proof proffered on this point is an isolated passage from Beck's deposition in which Beck testifies that he may not have received *one* particular financial estimate shown to Beck at the deposition (R5-138-Ex 15 at 120-21). The New Jersey Group ignores the many other false financial statements on which Beck did rely in extending the guaranty (R5-160-Ex 18 at ¶2; R5-160-Ex 1 at ¶¶18-22; R1-25 at 3-5).

The New Jersey Group further argues that Beck testified during deposition that he had full knowledge of the Chief situation. This reasonable reliance argument is a question of fact for the jury. *Wolff*, 985 F.2d at 1531; *Souran*, 982 F.2d at 1505. Furthermore, the New Jersey Group ignores the evidence that Beck was unaware of the

most material fact which gives rise to this claim: Chief was in reality an actual loss to SIG, something the Defendant Directors hid from Beck (R5-161-Ex 18 at ¶3; R5-160-Ex 10 at 72-73). While Beck may have known that funds were being disbursed to Chief and may have seen some indication of Chief's default, the Defendant Directors portrayed Chief as a contractor who had a short term cash flow problem (R5-160-Ex 10 at 126), and assured Beck that SIG was "going to get repaid all [its] money" (*Id.*). Beck did not know and, given the information available to him, could not have known that Chief was a true loss and not an asset (*Id.* at 126-27; R5-161-Ex 13 at 31-32; R5-161-Ex 18 at ¶3; R5-161-Ex 30 at 8).

Finally, the New Jersey Group attacks Beck's evidence that he was induced to enter the Guaranty by the concealment of the decision to terminate him as SIG's President. The evidence presented by Beck, however, is sufficient to create issues of fact requiring resolution by a jury. Initial Brief at 13-14.[2]

Thus, the cases cited by the New Jersey Group in which the record evidence was amenable to only one interpretation – that plaintiff had not relied on defendants' representations – are not applicable. *See, e.g., Pelletier v. Zweifel*, 921 F.2d 1506 (11th Cir.), *cert. denied*, 502 U.S. 855 (1991). In the present case, issues of fact remain.

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[2] Once again, the New Jersey Group selectively attacks certain evidence as hearsay. The attack is misplaced and untimely. *See, Rock v. Huffco Gas & Oil Co., Inc.*, 922 F.2d 272, 281 (5th Cir. 1991) (statement by party's agent is non-hearsay); *see also supra* at 4-5 (waiver of evidentiary objections).

IV. BECK HAS STANDING AS A WHISTLE BLOWER.

A. Section 1962(d) Does Not Require Predicate Act Injury.

The New Jersey Group's Answer Brief distorts the central point of §1962(d): "a conspiracy to violate RICO's substantive provisions is itself a violation of RICO . . . ; [Therefore,] a person injured 'by reason of' the conspiracy has been injured 'by reason of' the RICO violation." *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 348-49 (7th Cir. 1992). This is all that is required for standing under §1964(c). *Id.* at 349.

The New Jersey Group argues that the Court should ignore the RICO statute's unambiguous wording because permitting recovery under §1962(d) for non-predicate act injuries "would render most of RICO meaningless" by providing recovery for acts other than the predicate acts which Congress deliberately enumerated. Answer Brief at 41. In the absence of a "clearly expressed legislative intent to the contrary," however, a statute's unambiguous language must be regarded as conclusive. *U.S. v. Turkette*, 452 U.S. 576, 580 (1981). By merely pointing to the list of predicate acts enumerated by Congress in §1961(1), the New Jersey Group has failed to demonstrate the "clearly expressed legislative intent" required to contravene RICO's unambiguous language. Moreover, had Congress wished to limit recovery to harm caused by the commission of predicate acts, it could have written the statute to affirmatively reflect such a limitation. *Schiffels*, 978 F.2d at 349-50. Instead, §1964(c) allows suits by anyone injured by a violation of §1962. *Id.* The language of the statute is clear. *See* Initial Brief at 36-38.

Without any support, the New Jersey Group assumes that the predicate acts themselves are the sole target of RICO. Recovery under §1964(c), however, should not be artificially limited to predicate act injury, especially in light of the legislative statements about RICO serving as a tool for "attacking crime on all fronts." *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 105 S.Ct. 3275, 3286 (1985). §1964(c) does attack crime on many fronts, providing recovery for much more than mere predicate act injury. §1962(a) targets the use or investment of racketeering income; recovery under this section is therefore limited to harm flowing from such use or investment and *not* from the commission of the predicate acts themselves. *See Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1149 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989). Similarly, §1962(b) provides recovery for injury flowing from the acquisition or maintenance of an interest in or control of an enterprise through racketeering activity, and not from the predicate acts themselves. *See, e.g., Danielsen v. Burnside-Ott Aviation Training Center*, 941 F.2d 1220, 1231 (D.C.Cir. 1991).

In §1962(c), Congress provided a remedy for injuries caused by the commission of predicate acts. *Sedima*, 105 S.Ct. at 3286. In contrast, §1962(d), like subsections a and b, on its face targets conduct that is separate from the predicate acts themselves – conspiracies. Thus, placing a predicate act requirement on §1962(d) would not only impermissibly disregard RICO's plain meaning, but also would disrupt Congress' multifaceted scheme to combat crime.

B. The 1962(d) Violations Proximately Caused Beck's Injuries.

For the first time, the New Jersey Group now challenges Beck's conspiracy claim on factual grounds. As such, this argument should not even be considered. *See infra* at 21-22. Had the New Jersey Group challenged Beck's facts supporting his claim before the District Court, Beck would have submitted substantial additional evidence on this point, as he did in his opposition to Littenberg's Motion for Summary Judgment (R5-134).

Moreover, the New Jersey Group's argument ignores the law. "Because conspiracies are carried out in secret, direct proof of agreement is rare." *U.S. v. Koenig*, 856 F.2d 843, 854 (7th Cir. 1988). Often, no one outside of the conspirators "could be expected to have knowledge of the conspiracy." *Kraemer v. Grant County*, 892 F.2d 686, 690 (7th Cir. 1990). The existence of a conspiracy and a defendant's agreement to be part of it can be proven wholly from the conduct of the alleged co-conspirator or from circumstantial evidence of the scheme. *U.S. v. Church*, 955 F.2d 688, 695 (11th Cir. 1992). Accordingly, conspiracy cases are ill-suited for disposition via summary judgment, and where the facts are controverted, as is the case here, the evidence should be evaluated by a jury. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1961).

The New Jersey Group's argument also ignores the record evidence already proffered, including that Beck was beginning to thwart the conspiracy prior to his termination, establishing the conspirators' motive to wrongfully terminate Beck. *See* Initial Brief at 15. Furthermore,

the evidence demonstrates that 1) Beck's power within SIG and his access to important company information were systematically cut off, 2) it was known well in advance at SIG that Beck would be fired, and 3) the conspirators unanimously voted to terminate Beck. *Id.* at 14-16. This evidence precludes summary judgment. *See, e.g., Smith v. Our Lady of the Lake Hospital, Inc.*, 960 F.2d 439, 445-46 (5th Cir. 1992) (evidence that defendants fired doctor for reasons other than his lack of medical skill supported finding of conspiracy); *Montgomery v. Hughes*, 716 F.Supp. 261, 263 (S.D. Miss. 1988) (motive is "an issue appropriately resolved by the jurors' assessment of the credibility of [testimony]").

The New Jersey Group also seeks to bootstrap its argument on the dismissal of Firemark. Firemark's role in the conspiracy, however, is not critical to Beck's claim, but simply provides further evidence of the New Jersey Group's involvement in the conspiracy. The new evidence that Firemark's principal, Joanne Morrissey, fabricated grounds for Beck's termination because she wanted Beck's job establishes evidence of the conspiracy, given that, as her payoff, she was given Beck's job after his termination (R5-161-Ex 16 at 80-81; R5-162-Ex 48 at 372-73).[3]

The New Jersey Group also seeks to ignore the direct evidence of its participation in secret meetings. *See* R5-134-Ex J at #30; R5-134-Ex K at 13; R7-205 at 65-66. This provides circumstantial evidence of the conspiracy.

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[3] Once again, the New Jersey Group makes a selective, improper and untimely attack on certain evidence as hearsay.

See, e.g., Crowe v. Lucas, 595 F.2d 985 (5th Cir. 1979); *Thomas v. City of New Orleans*, 687 F.2d 80 (5th Cir. 1982); *Ferguson v. Omnimedia, Inc.*, 469 F.2d 194, 197 (1st Cir. 1972); *Epprecht v. Delaware Valley Machinery, Inc.*, 407 F.Supp. 315, 323 (E.D. Penn. 1976) (evidence of secret meetings provided grounds from which factfinder could infer existence of conspiracy).

V. BECK HAS STANDING TO PURSUE HIS FAILURE TO SELL STOCK CLAIM.

The New Jersey Group's citations and arguments fail to respond to the crux of Beck's claim for fraudulent inducement not to sell his SIG stock: unlike other shareholders, the New Jersey Group had a duty to disclose to Beck, given its business relationship with him. The evidence supports Beck's claim. *See, e.g.*, R5-160-Ex 9 at 55 (had the information not been fraudulently concealed, Beck would have stopped the illegal activity, as he had in the past, and then sold his stock).

Furthermore, under the law of this Circuit, Beck's damages are not too speculative. As long as the plaintiff can make a showing that the defendants are responsible for his damages, a wrongdoer cannot escape liability simply because the harm he caused is difficult to precisely value. *Burger King Corp. v. Mason*, 710 F.2d 1480 (11th Cir. 1983), *cert. denied*, 465 U.S. 1102 (1994). If, as here, the defendants, by their wrongdoings, have prevented precise computation of damages, a reasonable estimate of damages based on the relevant data available

is proper. *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962).[4]

VI. THE PATTERN ARGUMENT DOES NOT PROVIDE A BASIS FOR AFFIRMING.

A. Pattern Includes Predicate Acts Committed Against Others.

"Separate acts of fraud on various separate parties" can constitute a pattern under RICO. *S.J. Advanced Technology & Manufacturing Corp. v. Junkunc*, 627 F.Supp. 572, 577 (N.D.Ill. 1986). Where a RICO violator has more than one victim, "each victim can sue the RICO violator, adducing *evidence* of the offense against the other victim to meet the proof requirements of the statute as to 'pattern.' " *Papaginaais v. Pontikis*, 108 F.R.D. 177, 179 (N.D.Ill. 1985); *see also Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806, 809-10 (7th Cir. 1987) (noting absence of even one case where a civil RICO plaintiff was precluded from recovering damages because he failed to show injury resulting from *all* of the predicate acts constituting the pattern).

A contrary holding would undermine RICO's purpose:

> For example, [under Defendants' view of the law,] if an organized crime group were to operate a protection racket, extorting money from

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[4] Through expert testimony, Beck's damages can be reasonably estimated from the average value of SIG's stock for the applicable period, without reference to illegal activities.

> each merchant in a community, then each merchant's injury would be separate, and therefore, . . . none could recover.

Town of Kearny v. Hudson Meadows Urban Renewal, Corp., 829 F.2d 1263, 1268 (3d Cir. 1987) (it is only necessary to prove harm from *any* predicate act). Thus, the New Jersey Group's unsupported arguments to the contrary should be rejected.

B. Beck Has Fulfilled The Pattern Requirement.

RICO's pattern requirement is comprised of two elements, "continuity plus relationship." *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). Beck has satisfied both of these elements.

1. The predicate acts are "related."

The test for determining whether predicate acts are related for the purposes of RICO's pattern requirement is as follows:

> [C]riminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

Id. at 240. The test for relatedness is broad, and is not a cumbersome one for a RICO plaintiff. *Banks v. Wolk*, 918 F.2d 418, 422 (3d Cir. 1990). In order for predicate acts to be related, they must merely bear *some* relationship to each other. *Purvis v. Hamwi*, 828 F.Supp. 1479 (D-Col.

1993). Various schemes employing different techniques may constitute a pattern if they have the same general goal. *Wolk*, 918 F.2d at 424. "[I]f too close a relationship among multiple schemes is required, cases within RICO's intended ambit may be improperly dismissed." *Id.*

This relatedness requirement can be met by showing either that the predicate acts are related to each other, or that they are related to an external event or circumstance. *Koal Indus. Corp. v. Asland, S.A.*, 808 F.Supp. 1143 (S.D.N.Y. 1992). Thus, the "relatedness requirement is satisfied even if the predicate acts are not directly related to each other so long as both are related to the RICO enterprise in such a way that they become indirectly connected to each other." *U.S. v. Locascio*, 6 F.3d 924, 943 (2d Cir. 1993), *cert. den.*, 114 S.Ct. 1646 (1994).

The predicate acts committed directly against Beck were not isolated, but instead formed a collection of similar and related events. The fraudulent schemes and actions targeted Beck as one of the intended victims. The predicate acts were all committed by the same or similar defendants. The predicate acts committed, mail and wire fraud, were the same in each scheme.

Similarly, the substantial number of predicate acts directed against other victims are sufficiently related to form part of the same general pattern. The illegal conduct against others often made up the substance of the misrepresentations and omissions which formed the basis for the mail and wire fraud committed against Beck. For example, the extortion of contractors and the falsified financial information were both kept from Beck, and had this information been known to him, Beck would not

have suffered some of his damages (R5-161-Ex 18 at ¶3; R5-160-Ex 10 at 75, 125-27).

All of the predicate acts alleged relate to the operations of SIG and the Defendant Directors' role in its affairs. All of the predicate acts arose from the same conspiracy between the Defendant Directors. The predicate acts, whether mail fraud, wire fraud or extortion, were all driven by the same or similar purposes: to illegally obtain benefits through SIG for the enterprise and its members.

These similarities among the predicate acts are sufficient to establish relatedness under RICO's pattern requirement. *See, e.g., U.S. v. Grubb*, 11 F.3d 426 (1993) (predicate acts were related where purpose in each case was to elect candidates supported by illegal campaign contributions, and the result in each was election by means of illegal plan), *aff'd*, 65 F.3d 167 (4th Cir. 1995); *U.S. v. McDade*, 827 F.Supp. 1153 (E.D.Pa. 1993) (predicate acts of accepting bribes were related to Congressman's office so as to establish that activities of office were conducted through pattern of racketeering activity, even where more than one scheme was alleged involving multiple sources of bribes), *aff'd*, 28 F.3d 283 (1994), *cert. denied*, 115 S.Ct. 1312 (1995).

2. The predicate acts are "continuous."

"Continuity" is both a closed and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that, by its nature, projects into the future with a threat of repetition. *H.J., Inc.*, 492 U.S. at

241. The continuity element may be established by proving a series of related predicate acts over a substantial period of time. *Colonial Penn Ins. Co. v. Value Rent-A-Car, Inc.*, 814 F.Supp. 1084 (S.D. Fla. 1992). The continuity requirement may also be satisfied by a showing that the predicate acts are a regular way of conducting the defendants' ongoing business or enterprise. *H.J., Inc.*, 492 U.S. at 243. Proof that defendants were involved in multiple schemes is indicative of the continuity of the defendants' racketeering activity. *Id.* at 240.

Beck presented evidence of several interrelated, overlapping schemes to defraud him and others in furtherance of an overall racketeering conspiracy. Pursuant to these schemes, among other things, the New Jersey Group fraudulently induced Beck to make an unsecured loan and to buy stock in August 1986 and to be a personal guarantor in December 1987. Further, Beck was merely one of the New Jersey Group's many victims.

The Defendant Directors' racketeering conduct included mail fraud, wire fraud and extortion conducted over a several year period, commencing in the Fall of 1985 and continuing until, at least, after Beck was terminated in May of 1988. *See generally* R5-159 and R5-163. This conduct satisfies the continuity requirement. *See, e.g., Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986) (nine acts of mail and wire fraud over 3-year period satisfies continuity requirement); *Colonial Penn*, 814 F.Supp. 1084 (acts of mail and wire fraud over 2-years satisfies continuity requirement); *Ticor Title Ins. Co. v. Florida*, 937 F.2d 447 (9th Cir. 1991) (same – three forgeries over 13 months); *U.S. v. Stodola*, 953 F.2d 266 (7th Cir. 1992) (same – several bribes over 20 months).

C. The Pattern Argument Should Not Be Considered.

The New Jersey Group admits that the District Court declined to address its argument that Beck could not meet RICO's pattern requirement, but asserts that this argument provides a proper basis for affirming the opinion below. This is contrary to the general rule that issues not considered by the district court should not be considered on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir.), *cert. denied*, 116 S.Ct. 74 (1995); *Topalian v. Ehrman*, 954 F.2d 1125, 1131-32 n.10 (11th Cir.), *cert. denied*, 506 U.S. 825 (1992).

The lower court properly declined to consider the pattern argument, which was raised for the first time in the New Jersey Group's Reply Memorandum in Support of its Motion for Summary Judgment (R5-164 at 5-6, 8). New arguments should not be made for the first time in a reply memorandum. *See, e.g., Gold v. Wolpert*, 876 F.2d 1327, 1331 (7th Cir. 1989); *Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1332 (9th Cir. 1981); *Miss. River Corp. v. F.T.C.*, 454 F.2d 1083, 1093 (8th Cir. 1972).

VII. THE LOWER COURT ERRED IN DISMISSING BECK'S PENDENT CLAIMS.

The New Jersey Group's Answer Brief ignores Beck's central argument regarding reversal of the dismissal of his pendent claims: that the lower court abused its discretion by applying an inapplicable statute and by not conducting the required inquiry under the appropriate

common law, including taking into account the statute of limitations bar that now exists as to Beck's state claims. The Answer Brief at 46-47 cites only to a Ninth Circuit case, ignoring the unambiguous Eleventh Circuit precedent cited in Beck's Initial Brief at 47-48, which holds that dismissal of the state claims once the limitations period has run constitutes an abuse of discretion. Moreover, unlike the plaintiff in *Notrica v. Board of Supervisors*, 925 F.2d 1211, 1215 (9th Cir. 1991), the case cited by the New Jersey Group, Beck did not simultaneously file his claims in both state and federal court, but rather, voluntarily dismissed his claims in Florida state court and re-alleged them as cross-claims in New Jersey federal court so that he would not be forced to litigate the identical complex issues in two separate forums.

The New Jersey Group also asserts that Beck is to blame for his predicament because Beck engaged in forum shopping and dilatory behavior. These are unsupported and false conclusions drawn only by the New Jersey Group. *See* R6-191 at 6-7.

VIII. THE LOWER COURT ERRED IN DISMISSING THE SPARBER CLAIMS.

Even after Sparber's Answer Brief, the following facts remain undisputed: 1) M&S filed a Notice of Appearance on behalf of Sparber; 2) M&S participated in all phases of pretrial activity in this case; 3) M&S represented Sparber in at least five other Florida actions relating to SIG; 4) M&S represents Sparber now in this action; and 5) Sparber waited approximately 4 years after the

filing of the Notice of Appearance to challenge the service upon him. Given these facts, the lower court erred in granting Sparber's Motion to Dismiss.

Sparber claims that M&S did not know that it had filed the Notice of Appearance on behalf of Sparber – but it was M&S that filed the document. Sparber also makes much of the fact that M&S was counsel for Littenberg and that M&S's participation in the litigation was on behalf of Littenberg, not Sparber. Beck, however, had no way of knowing that Sparber considered himself not to be a party or that he was waiting until after the statute of limitations had passed to challenge service.

Sparber continues to deny the existence of an attorney-client relationship. The applicable law, however, remains undisputed – even where the alleged principal and agent both deny the existence of an agency relationship, the trier of fact is entitled to infer the existence of such a relationship from the facts and circumstances of the case. *Overseas Private Investment Corp. v. Metropolitan Dade County*, 826 F.Supp. 1564, 1576 (S.D.Fla. 1993), *aff'd in part, rev'd in part on other grounds*, 47 F.3d 1111 (11th Cir. 1995); *Watkins v. Sims*, 88 So. 764 (Fla. 1921); *Singer v. Star*, 510 So.2d 637, 640 (Fla. 3d DCA 1987). Nothing in Sparber's Brief even addresses Beck's argument that the lower court erred by assuming that Beck was not contesting whether M&S actually represented Sparber throughout the litigation and by not evaluating the evidence of the relationship's existence.

Contrary to Sparber's bald assertion, the Notice of Appearance filed by M&S on Sparber's behalf is not the

only record evidence of the ongoing attorney-client relationship between Sparber and M&S. Specifically, M&S represented Sparber in at least five other related actions in Florida, all of which revolve around Sparber's involvement in SIG. It is inconceivable that M&S was not keeping Sparber informed, actively advising him and safeguarding his interest in this action.

Mandler never advised Beck that M&S did not represent Sparber in this matter. On the contrary, upon receiving notice that Beck intended to take Sparber's deposition, Mandler immediately responded that Sparber had not been properly served and that Beck would be required to obtain a subpoena, indicating that M&S was handling the matter for Sparber. See Answer Brief of Sparber at 3. This was consistent with M&S's numerous other representations of Sparber. In fact, Mandler's Affidavit fails to deny the existence of such a relationship (R2-64-Ex B).

Moreover, Sparber does not deny, nor could he, that if M&S's substantial participation in this litigation prior to the filing of Sparber's Motion to Dismiss were imputed to him, Sparber would be deemed to have waived his service of process defense. Sparber's argument, that M&S only asked questions regarding Littenberg during the numerous depositions it attended (Sparber's Answer Brief at 11-12), proves too little, as it does not deny that through M&S's participation in discovery and other pretrial proceedings, Sparber was able to keep intimately in touch with the litigation. By so doing, M&S enabled Sparber "to lie in wait and ambush [Beck] on the eve of trial, after years of discovery, at a time when it was too late for [Beck] to refile the claim due to the expiration of

the statute of limitations. . . . " *Beneviste v. Eiseman*, 119 F.R.D. 628, 630 (S.D.N.Y. 1988). This is simply not permissible. *See, e.g., Id.; Santos v. State Farm Fire and Cas. Co.*, 902 F.2d 1092, 1096 (2nd Cir. 1990); *Norling v. Valley Contracting and Pre-Mix*, 773 F.Supp. 186, 188 (D.N.D. 1991).

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I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. mail on this 1st day of April, 1996 to all counsel on the attached service list.

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**Opinion of the U.S. Court of Appeals,
Eleventh Circuit in Case Nos. 95-4844, 95-5586**

The full text of the Opinion appears in the Appendix to Petitioner, Robert A. Beck, II's, Petition for Writ of Certiorari at pages App. 1 – App. 22 and is, therefore, not duplicated in this Joint Appendix

(7)

No. 98-1480

Supreme Court, U.S.
FILED
JUL 22 1999
CLERK

In The

Supreme Court of the United States

ROBERT A. BECK, II,

Petitioner,

vs.

RONALD M. PRUPIS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether an employee who is terminated for both blowing the whistle on and refusing to participate in a pattern of predicate acts of racketeering forbidden by the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, may assert a civil RICO conspiracy claim, where he has been injured by an overt act in furtherance of the RICO conspiracy, which overt act is not, itself, a predicate act of racketeering.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the District Court and Court of Appeals were:

Plaintiff Robert A. Beck, II, Petitioner here

Defendant Ronald M. Prupis, Respondent here

Defendant Leonard Bellezza, Respondent here

Defendant Ernest J. Sabato, Respondent here

Defendant William Paulus, Jr., Respondent here

Defendant Harry Olstein, Respondent here

Defendant Frederick C. Mezey, Respondent here

Defendant Joseph S. Littenberg, Respondent here

Defendant Byron L. Sparber, not a party here

Defendant Neil Prupis, not a party here

Defendant William Lipkind, not a party here

Defendant Firemark Consultants, Inc., not a party here

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 162 F.3d 1090, and is reprinted in the Appendix to Petitioner Robert A. Beck, II's ("Beck") Petition for Writ of Certiorari ("CP App."), p. 1.

The opinion of the United States District Court for the Southern District of Florida (Roettger, D.J.) is unreported, and is reprinted at CP App. 23.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on December 15, 1998. Petitioner filed his Writ of Certiorari on March 12, 1999, which this Court granted on June 7, 1999. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions at issue in this case are 18 U.S.C. §§ 1962(d) and 1964(c) of RICO, which are reprinted at CP App. 47.

STATEMENT OF THE CASE

1. Beck's Claim.

Beck brought this RICO action for damages he suffered to his business and property by reason of an overt

act committed by former officers and directors (the "Defendant Directors") of Southeast Insurance Group, Inc. ("SIG" or the "Enterprise"), in furtherance of their conspiracy to violate RICO. The Defendant Directors' racketeering activity consisted of extortion, mail fraud and wire fraud, including extortion of contractors (Beck's Crossclaim and Third Party Complaint (the "Verified Complaint") at ¶¶ 23-30) (Joint Appendix at ("JA") 61-63), falsification of financial statements (*Id.* at ¶¶ 18-19 and 22), looting of the Enterprise (*Id.* at ¶¶ 20-21, 33-35 and 37-41), fraudulent promises to indemnify (*Id.* at ¶ 32), set aside fraud (*Id.* at ¶ 31), and attempted options fraud (*Id.* at ¶ 36). Approximately 50 predicate acts are set forth in detail in the Verified Complaint, fulfilling RICO's pattern requirement (*Id.* at ¶¶ 79-128). When Beck refused to participate in and became a threat to the Defendant Directors' continued racketeering activities, he was discredited and terminated (*Id.* at ¶¶ 12-13 and 43-60).

2. The Eleventh Circuit's Findings Based Upon The Evidence Presented.

Based upon the evidence presented, which is discussed in further detail in Section 3, *infra*, the Eleventh Circuit found as follows:

> This case arises out of the relationship between . . . Beck, the plaintiff, and members of the board of directors of the Southeastern Insurance Group (SIG). SIG was a holding company founded in 1983. It owned three subsidiaries, all of which were in the business of writing surety

bonds for construction contractors. The defendants in this case were all directors of SIG at one time.

In 1987, some of the directors of SIG (including the defendants) began engaging in improper activity. For instance, they set up an entity called Construction Performance Corporation (CPC), which extracted substantial "fees" from otherwise non-creditworthy contractors in order to qualify them for SIG surety bonds, in violation of insurance regulations. The directors reneged on promises to indemnify certain contractors, and diverted corporate funds to their personal use. Finally, these directors knowingly classified certain SIG liabilities as assets on SIG's financial statements, causing the statements drastically to overestimate the corporation's value. These false financial statements were then given to regulators, shareholders, and creditors.

This misconduct eventually led to a lawsuit by the Florida Department of Insurance and a shareholders' derivative suit against SIG's officers and directors. In January 1990, as a result of the illegal activities of certain SIG directors and the consequent lawsuits, SIG filed for bankruptcy in the Southern District of Florida.

Meanwhile, in August 1983, SIG had hired Beck to serve as president and as a member of the board of directors. His employment contract, as revised in 1986, did not expire until 1991. The contract specified the grounds on which Beck's employment could justifiably be terminated, and stated that termination for any other reason would result in SIG being required to repurchase Beck's substantial stock holdings in

the company. The repurchase price would be the fair market value of the stock as determined by an investment bank.

For most of his tenure, Beck was unaware of the illegal activities of the other SIG officers and directors. When he became aware of this misconduct in early 1988, he attempted to correct them internally and informed insurance regulators about improprieties in SIG's financial statements. The other directors, afraid that Beck might expose their misdeeds, arranged for a consulting firm to write a report criticizing Beck's performance, thus providing the directors an excuse to terminate Beck's employment without having to repurchase Beck's stock. In May 1988, Beck was fired.

Beck v. Prupis, 162 F.3d 1090, 1093-1094 (11th Cir. 1998) (CP App. 2-4) (footnotes omitted).

3. The Underlying Evidence.

a. Background Facts.

SIG was a Florida-based insurance holding company. Until 1990, when it filed a petition for bankruptcy, SIG owned several insurance company subsidiaries, which were in the business of writing surety bonds for construction contractors (Verified Complaint at ¶ 7 (JA 57)). Pursuant to an employment agreement that, with amendments, was to expire in 1991, Beck served as SIG's president from its inception, in 1983, until he was wrongfully terminated in 1988 (*Id.* at ¶ 43 (JA 67)).

b. The Evidence of the Pattern of Racketeering Activity.[1]

i. Extortion of contractors.

Pursuant to their RICO conspiracy, the Defendant Directors extorted scores of contractors (R161-Ex15 at 34-35, 58-61, 180, 202-205; R161-Ex34 at 127-128; R161-Ex25 at 100-101, 336, 344; R161-Ex23 at 103).[2] Specifically, in early 1987, certain of the Defendant Directors created a separate corporation, Contractors Performance Corp. ("CPC"), to extort contractors applying for surety bonds from the SIG insurance subsidiaries (R161-Ex15 at 18-23; R161-Ex23 at 105-108; R161-Ex31 at 47-50; JA 61 at ¶ 23). The Defendant Directors forced the contractors to pay illegal fees (from 50% to 300% of the bond premium) to CPC to "qualify" for surety bonds, in addition to the surety bond premium the contractors were already paying to the SIG insurance subsidiaries (R161-Ex15 at 180;

---

[1] Only some of the evidence of some of the Defendant Directors' racketeering conduct is highlighted in this section. For a more thorough discussion of the details of all of the racketeering conduct, see Beck's Statement of Material Facts in Opposition to the New Jersey Group's Motion for Summary Judgment (JA 234-260); Beck's Memorandum of Law in Opposition to the New Jersey Group's Motion for Summary Judgment (JA 261-284); the exhibits to both of these documents (Record 160-162); and Beck's Initial Brief filed in the Eleventh Circuit Court of Appeals (JA 303-371).

[2] The district court clerk placed many of the exhibits filed, due to their volume, in expandable folders, without numbering the pages. Accordingly, citations to those exhibits will be as follows: "R(Record document number) – Ex(exhibit number) at (page number or paragraph)". For example, page 18 of Exhibit 15 to document 161 will be cited as R161-Ex15 at 18.

R161-Ex23 at 105-108; JA 61 at ¶ 23; R162-Ex50 at 3-4; R161-Ex18 at ¶ 4).

Contractors seeking bonds from the SIG insurance subsidiaries were threatened that, unless they agreed to pay these illegal fees to CPC, bonds would not be issued (R161-Ex15 at 194; R161-Ex32 at 86-87; JA 62 at ¶ 24; R162-Ex50 at 3-4). In most cases, the financial condition of these contractors prevented them from obtaining bonds elsewhere (R161-Ex23 at 83, 120-121). More than one hundred contractors applying for SIG surety bonds were forced to agree to pay these illegal fees to CPC (R161-Ex33).

One example of this illegal conduct involved JJW Construction, Inc. ("JJW"). JJW, an applicant for surety insurance at SIG's insurance subsidiary, was extorted to pay a $275,000 fee to CPC in exchange for the posting of a $500,000 letter of credit from one of the Defendant Directors, Leonard Bellezza ("Bellezza") (R161-Ex15 at 58-59; R161-Ex32 at 42-45, 75-76; R161-Ex34 at 126-130; R161-Ex25 at 84-86, 336 and 343; R161-Ex35; R161-Ex18 at ¶ 4; R161-Ex30 at 4; JA 62 at ¶¶ 24-25, JA 78-79 at ¶¶ 97-105). Another example involved Chief Structures, Inc. ("Chief") (for a more thorough discussion of the extortion of Chief, see Subsection ii, *infra*).

ii. Fraudulent financial statements.

As part of their conspiracy, the Defendant Directors falsified SIG's financial statements, resulting in a material overstatement of the value and net income of SIG and its subsidiaries. The Defendant Directors then used these

fraudulent financial statements to obtain a $7.5 million loan from First Fidelity Bank and as the basis of reports to SIG's regulators, creditors and shareholders (R162-Ex53 at 182-183; R162-Ex43 at 25-26, 153-157, 182; JA 138).

One example of the manner in which the Defendant Directors falsified SIG's financial statements involved Chief, a contractor who was issued bonds by one of SIG's insurance company subsidiaries ("SCI"). In sum, the Defendant Directors and others caused SIG to account for payments made as a result of claims against Chief as a "note receivable", an asset, instead of as a claims payment, which is an expense (R162-Ex51 at 5; R161-Ex30 at 5-6; R161-Ex20 at 6-7; R161-Ex22 at 5-6). SIG neither established nor reported loss reserves for future claims payments (R161-Ex17 at 215-218). This resulted in the fraudulent overstatement of SIG's financial condition by millions of dollars (R161-Ex30 at 5-6; R162-Ex51 at 5-6).

Specifically, in 1987, Chief notified SIG that it was experiencing financial difficulties and would be unable to meet its obligations under construction contracts for which SCI had provided bonds (R161-Ex19 at ¶¶ 6-8). Thereafter, Chief requested additional bonds (R161-Ex20 at 4). SCI determined that Chief would need to post collateral or produce an additional indemnitor to qualify for the new bonds (*Id.*). Bellezza agreed to sign a general indemnity agreement to enable new bonds to be issued to Chief, in exchange for a participation in Chief's profits (R161-Ex21 at 91-92; R161-Ex20 at 5). Because the profit participation fees could not be paid to Bellezza without violating insurance laws, SIG's affiliate, CPC, was used as

a front (R161-Ex23 at 100-118). Contrary to his representation, Bellezza never executed the general indemnity agreement (R161-Ex20 at 5).

Various members of the Defendant Directors drafted an agreement (the "Chief Agreement") and forced Chief to execute it (*Id.* at 4-5; R161-Ex17 at 102-103). This agreement provided: (1) Chief would form a new entity and 10% of the shares would be owned by CPC, which would elect one half of the Board of Directors of the new entity; (2) CPC would provide financial guarantees to SCI in order for SCI to issue the new bonds to Chief; (3) CPC would "arrange" for funds to be loaned to Chief, to complete projects bonded by SCI; (4) Bonds issued prior to the Chief Agreement would be classified as Group A bonds and new bonds issued after the Chief Agreement would be classified as Group B bonds; and (5) CPC would receive 50% of the profits on Group B bonds, but not less than $500,000 (R161-Ex24).

The Defendant Directors required the profit participation of CPC on construction projects bonded by SCI as a condition for issuing the surety bonds (R161-Ex15 at 89-90, 129, 137-140; R161-Ex23 at 87-90; R162-Ex50 at 2). The CPC fees were payable in addition to the premium payable to SCI (R161-Ex23 at 112, 117-118; R162-Ex50 at 3). These CPC fees constituted an illegal and excessive premium in direct violation of insurance laws (R161-Ex23 at 100-118; R162-Ex50 at 3-4). Chief was extorted into agreeing to pay these premiums to CPC (*see also* JA 148, 152-153, 156; JA 62 at ¶¶ 24, 25, JA 83 at ¶ 127). Furthermore, the arrangement of loans by CPC to Chief was a sham, with CPC fronting for the SIG insurance subsidiaries, which actually did advance funds to Chief (R162-

Ex50 at 2-3). Such loans were, however, prohibited under Florida insurance law (R161-Ex25 at 246-249; R161-Ex26).

The Chief Agreement was executed at a time when there were claims and losses on the prior bonds to Chief (the Group A bonds) (R161-Ex17 at 78-84; R161-Ex15 at 90-93; R161-Ex24 at 1). This agreement therefore allowed the Defendant Directors to hide the losses, and actually to characterize them as an asset (JA 60 at ¶ 19).

The Defendant Directors concealed the claims on the Chief bonds in SIG's financial reports (R161-Ex18 at ¶ 3). In fact, the Claims Summaries that were disseminated (by mail) at the time (R161-Ex27 and Ex28; *see also* R161-Ex13 at 149) omitted any listing of the Chief bonds (R161-Ex18 at ¶ 3C; R161-Ex13 at 149). These misleading Claims Summaries were also used to reflect the loss expense and loss reserve in the September 30, 1987 financial statements of SIG and its insurance company subsidiaries (R161-Ex18 at ¶ 3).

The omission of the Chief claims was a material fact. The Chief claims eventually amounted to paid losses for SIG in excess of $6 million (R161-Ex29).

iii. Looting SIG.

Additionally, the Defendant Directors looted SIG and its subsidiaries (R160-Ex1 at ¶¶ 20-22; R162-Ex51 at 11-12; JA 138-139). For example, after Beck's termination, the Defendant Directors stole $2.5 million of policyholder surplus from SIG's subsidiaries and transferred it to Bellezza, Harry Olstein (another of the Defendant Directors), and others (R162-Ex50 at 5-7; R162-Ex51 at 9-12;

R162-Ex40 at 66-68). They also stole $3.5 million of policyholder surplus from SIG's subsidiaries and transferred it to First Fidelity Bank (R162-Ex50 at 5-7; R162-Ex51 at 3, 11-12). Substantial funds also were taken improperly from one of SIG's subsidiaries by the back-dating of a reinsurance pooling agreement (R162-Ex50 at 5; R162-Ex51 at 7-8). Surplus interest in the amount of $3.6 million was paid to SIG and used primarily to fund debenture-holder payments, the vast majority of which were made to the Defendant Directors, while this money should have been paid to other parties (R162-Ex51 at 8; R162-Ex52 at 27, 64; R162-Ex53 at 161-168; R160-Ex4; R160-Ex5; R160-Ex6).

iv. Fraudulent promises to indemnify.

The Defendant Directors also made fraudulent statements about indemnifying SIG's insurance company subsidiaries so that bonds could be written to contractors in which the Defendant Directors had some interest. *See, e.g.*, R162-Ex54 at 2, R161-Ex20 at 2-3, and R161-Ex34 at 98-115 (relating to Aldrich Construction Co.); Subsection ii, *supra* (relating to Chief).

c. Beck's Termination in Furtherance of the RICO Conspiracy.

In furtherance of their racketeering conspiracy, the Defendant Directors purposely kept Beck out of the information loop at SIG (R162-Ex36 at 26-36, 39, 104-106, 129-130; R161-Ex16 at 32-35; R162-Ex37 at 24, 36-37; R162-Ex38 at 7-10). In fact, SIG employees were specifically

instructed to withhold essential information from Beck (*Id.*; R162-Ex39 at 23-25).

Nevertheless, in the Spring of 1988, Beck began to discover some of the illegal conduct. He prevented the theft of more than $2 million from one of SIG's subsidiaries (R162-Ex40 at 66; R161-Ex12 at 172-173) (as more fully detailed in section 3(b)(iii), *supra*, after Beck's termination, the Defendant Directors committed this theft). In addition, Beck contacted SIG's regulators and advised them that he had learned that the company's financial statements may have been overstated (R162-Ex41 at 6-7, 19; R161-Ex13 at 154-158).

Seeing Beck as a threat to their continued criminal conduct, the Defendant Directors embarked on a scheme to create false causes to terminate and discredit Beck (R162-Ex36 at 26-36, 39, 104-106, 129-130; R162-Ex39 at 23-25, 42-46; R162-Ex42 at 15-16, 71-74; R162-Ex43 at 80-85; R161-Ex12 at 171-173). Through a series of secret meetings from which Beck was excluded, the Defendant Directors hatched their conspiracy and retained Firemark Consultants, Inc. ("Firemark"), a consulting company (JA 137). Firemark's chairman confessed that Firemark fabricated things about Beck and recommended his termination because the president of Firemark wanted Beck's job (R162-Ex44 at 17-18). Firemark also fabricated documents to substantiate its recommendation to terminate Beck (*Id.*; R162-Ex47 at 42-43). On May 13, 1988, the Defendant Directors did, in fact, terminate Beck (JA 67-72). As part of Firemark's reward for its participation, the Defendant Directors gave Firemark's president Beck's job (R161-Ex16 at 80-81; R162-Ex48 at 372-373).

4. The Decisions Below.

Beck's claims were originally brought as cross-claims while he was a defendant in a shareholder derivative suit against SIG and its directors in the United States District Court for the District of New Jersey. *Beck*, 162 F.3d at 1093 n.1 (CP App. 2). Beck's cross-claims were subsequently severed and transferred to the Southern District of Florida. *Id.*; *see also* R1.

The United States District Court for the Southern District of Florida granted the Defendant Directors' Motion for Summary Judgment, holding that, assuming all evidence in Beck's favor to be true, as a matter of law, Beck lacked standing to assert a claim for a RICO conspiracy for either being "discharged in retaliation for reporting a RICO mail fraud scheme, or for refusing to participate in the scheme," citing the Eleventh Circuit cases of *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), and *O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 496 U.S. 926, 110 S.Ct. 2620, 110 L.Ed.2d 641 (1990) (CP App. 42). *Morast* has since been disapproved of by this Court on other grounds. *Haddle v. Garrison*, ___ U.S. ___, ___, 119 S.Ct. 489, 491-492, 142 L.Ed.2d 502 (1998). The district court also relied on *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211 (5th Cir. 1988), which the Fifth Circuit has since limited to cases involving violations of RICO's substantive provisions (*see Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 152-153 (5th Cir. 1997)), and *Willis v. Lipton*, 947 F.2d 998 (1st Cir. 1991), in granting the Motion for Summary Judgment on this claim (CP App. 42).

While noting that Beck had set forth evidence of illegal conduct, the Eleventh Circuit held as follows:

> This case hinges on the following question: Must a plaintiff bringing a civil RICO conspiracy claim prove that the overt act (in furtherance of the conspiracy) by which he was injured was an "act of racketeering"? We answer the question in the affirmative, and therefore affirm the district court's grant of summary judgment.

Beck, 162 F.3d at 1093 (CP App. 2). In so holding, the Eleventh Circuit expressly noted a conflict between the circuits on this issue, pointing to decisions from the Seventh, Third and Fifth Circuits that disagreed with its holding, and cases from the Eighth, First, Ninth and Second that agreed. *Id.* at 1098-1099 (CP App. 14-16). The Eleventh Circuit also declined to apply principles from this Court's recent holding in *Salinas v. United States*, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997), to a civil RICO action. *Beck*, 162 F.3d at 1099 n.18 (CP App. 16-17).

SUMMARY OF ARGUMENT

The Defendant Directors terminated Beck for his refusal to participate in, and his blowing the whistle on, their racketeering conduct. Beck's injuries thus were caused by an overt act committed in furtherance of the Defendant Directors' conspiracy to violate the substantive provisions of RICO. As such, Beck was injured by reason of a violation of a section of § 1962, specifically § 1962(d), which prohibits RICO conspiracies.

Under the plain and unambiguous language of § 1964(c), this is all that is required to confer upon Beck a right to sue under RICO. There is simply no requirement contained anywhere in the statute that the overt act committed in furtherance of the RICO conspiracy that injures a person's business or property also be a predicate act of racketeering. As there is no ambiguity, this plain meaning controls. In fact, writing a predicate act injury requirement into this section of the statute would render § 1962(d) superfluous to § 1962(c) in the civil context, because, if a predicate act of racketeering itself causes the plaintiff's injury, then the plaintiff may bring a civil suit for the violation of § 1962(c).

Additionally, under traditional concepts of conspiracy law, which are incorporated into the RICO statute, no predicate act or substantive crime whatsoever need be committed to establish the conspiracy. The overt act need not even be unlawful, so long as it furthers the conspiracy. Congress intended RICO conspiracy law to be broader than traditional conspiracy law: to establish a RICO conspiracy, no overt act is even necessary. Congress did not so expand traditional conspiracy law and, at the same time, work the radical change of requiring the commission of a predicate act in order to establish civil liability for a RICO conspiracy.

Under *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), proximate causation provides the necessary limiting rationale so that not every injury that occurs by virtue of an overt act committed in furtherance of a conspiracy to violate RICO is actionable under RICO. The chain of causation is limited to direct injuries proximately caused

by the violation of § 1962 (not by the predicate acts themselves). Beck was directly injured by the Defendant Directors' conspiracy. His damages are unique, discreet and easily ascertainable. Beck, fired by the Defendant Directors to perpetuate their conspiracy, is within the zone of interests RICO is meant to protect.

Last, the intent of the RICO statute, public policy and legislative history all support this result. RICO is to be liberally construed to effectuate its remedial purpose. Congress drafted RICO in such a way so as to encourage private attorneys general to bring civil actions to assist in the fight against organized crime (which is not the sole limit of RICO's focus). Allowing persons such as Beck the right to sue would further these remedial purposes. This is especially true given the important function that whistleblowers serve in today's society, strengthening the evidence gathering process and providing an important tool in the fight against crime, both of which are expressed goals of RICO, as stated by Congress.

In sum, the question that the Eleventh Circuit determined this case hinged upon – "Must a plaintiff bringing a civil RICO conspiracy claim prove that the overt act (in furtherance of the conspiracy) by which he was injured was an 'act of racketeering'?" – should be answered in the negative and this case should be reversed and remanded for further proceedings.

ARGUMENT

I. THE RICO STATUTE CLEARLY AND UNAMBIGUOUSLY PROVIDES A RIGHT TO SUE TO A PERSON INJURED BY REASON OF AN OVERT ACT, WHICH IS NOT ALSO A PREDICATE ACT, COMMITTED IN FURTHERANCE OF A RICO CONSPIRACY.

The civil remedies provision of RICO provides that a person may sue thereunder if he has been injured "by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Section 1962 contains four subsections. The first three, subsections (a) through (c), are RICO's substantive sections. The fourth, subsection (d), provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." Thus, § 1964(c) algebraically provides that a person who has been injured by reason of a conspiracy to violate any of the provisions of subsections (a), (b), or (c) may sue therefor.

A person injured by an overt act committed in furtherance of a conspiracy to violate RICO's substantive sections has been injured by reason of a violation of § 1962(d). Under the clear and unambiguous language of the RICO statute, no more is necessary. There is no additional requirement contained anywhere in the statute that the injury-causing overt act also be a predicate act of racketeering listed in § 1961(1). As stated by the Seventh Circuit, "Congress could have written RICO to state that only those injured by reason of predicate acts committed as part of a RICO violation could sue. It did not, and for courts to read § 1964(c) as if that is what Congress wrote would be tantamount to rewriting the statute." *Schiffels v.*

Kemper Financial Services, Inc., 978 F.2d 344, 350 (7th Cir. 1992) (citations omitted). The Fifth Circuit's interpretation of the RICO statute similarly stays true to the language chosen by Congress:

> . . . we refuse to place "a limitation on RICO standing that RICO itself does not impose." *Schiffels*, 978 F.2d at 346. Since § 1962(d) does not require that a predicate racketeering act actually be committed, it follows that the act causing a § 1964(c) claimant's injury need not be a predicate act of racketeering. A person injured by an overt act in furtherance of a RICO conspiracy has been injured by reason of the conspiracy, and thus has § 1964(c) standing. *See Id.* at 349.

Khurana, 130 F.3d at 153.

It is fundamental that, where there is no ambiguity in the language of a statute, the plain meaning controls:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989); *see also Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 1149-1150, 117 L.Ed.2d 391 (1992).

Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117 S.Ct. 843, 846, 136 L.Ed.2d 808 (1997); *see also United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981) ("In determining the scope of a statute, we look first to its language. If the statutory language is

unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' ") (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)). This Court has applied this rule to the RICO statute on numerous occasions. *See, e.g., Salinas*, 522 U.S. at 58, 118 S.Ct. at 474 (citing, *inter alia, Ardestani v. INS*, 502 U.S. 129, 135, 112 S.Ct. 515, 519-520, 116 L.Ed.2d 496 (1991)); *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 260-261, 114 S.Ct. 798, 805-806, 127 L.Ed.2d 99 (1994); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493-500, 105 S.Ct. 3275, 3283-3287, 87 L.Ed.2d 346 (1985); *Russello v. United States*, 464 U.S. 16, 20, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983); *Turkette*, 452 U.S. at 580-581, 101 S.Ct. at 2527-2528. In *Sedima*, the Court rejected a "racketeering injury" requirement, as contrary to the plain language of the RICO statute. *Sedima*, 473 U.S. at 495, 105 S.Ct. at 3284 ("There is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement."). The Court held that the insertion of a requirement not otherwise present in the statute was " . . . a form of statutory amendment [not] appropriately undertaken by the courts." *Id.*, 473 U.S. at 500, 105 S.Ct. at 3287; *see also National Organization for Women*, 510 U.S. at 260-261, 114 S.Ct. at 805-806 (rejecting "economic motive" requirement for a civil RICO claim based upon a violation of § 1962(c), as being contrary to the language of the statute); *Turkette*, 452 U.S. at 580-581, 101 S.Ct. at 2527 (rejecting requirement that an enterprise be "legitimate," as being contrary to the language of the statute). Similarly, the clear and unambiguous statutory language chosen by

Congress contains no predicate act injury requirement for civil liability for a conspiracy to violate RICO.

It is also fundamental that a statute's provisions should not be construed so as to render aspects of the statute superfluous. *See, e.g., Kawaauhau v. Geiger*, 523 U.S. 57, 62, 118 S.Ct. 974, 977, 140 L.Ed.2d 90 (1998) (" . . . we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.") (citing *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837, 108 S.Ct. 2182, 2189, 100 L.Ed.2d 836 (1988)); *United States v. Menasche*, 348 U.S. 528, 538-539, 75 S.Ct. 513, 520, 99 L.Ed. 615 (1955) ("The cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section . . . .") (citations omitted). Construing the RICO statute to require that the injury-causing overt act committed in furtherance of a conspiracy also be a predicate act of racketeering, in fact, would render § 1962(d) superfluous to § 1962(c) in the civil context. A person directly injured by reason of a predicate act of racketeering may bring a civil suit for a violation of § 1962(c). *See, e.g., Sedima*, 473 U.S. at 496-498, 105 S.Ct. at 3285-3286; *Holmes*, 503 U.S. at 269-270, 112 S.Ct. at 1318. An identical requirement for a suit brought for a violation of § 1962(d) " . . . would ignore § 1964(c)'s provision for civil liability for, *inter alia*, a violation of § 1962(d) that proximately injures a person's property or business." *Khurana*, 130 F.3d at 153. "[I]t would be anomalous to allow plaintiffs to recover for harm suffered from investment in [§ 1962(a)], or control [§ 1962(b)] or conduct of [§ 1962(c)], a pattern of racketeering, yet preclude

recovery for conspiracy to commit these violations simply because the overt act that furthers the conspiracy does not itself qualify as racketeering." *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1170 (3d Cir. 1989).

The circuit courts that have written into the RICO statute a requirement that the overt act causing the injury also be a predicate act have utilized reasoning, which, while purporting to be based upon the statutory language, actually ignores the clear language of the statute. *See, e.g., Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir.) ("Imposing the predicate act requirement on civil claims based on violations of § 1962(d) narrows the focus of those suits to the specific racketeering activity that lies at the heart of the RICO statute."), *cert. denied*, 508 U.S. 957, 113 S.Ct. 2459, 124 L.Ed.2d 674 (1993); *Beck*, 162 F.3d at 1098-1099 (CP App. 15-16) (same); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 48 (1st Cir. 1991) (same); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990) (same).

This argument, however, ignores the plain, unambiguous meaning of the language selected by Congress and seeks to elevate over that language a perceived notion of the intent of Congress. Especially given the language used by Congress and the clear expressions of the true intent of the legislature, this is inappropriate. *See Sedima*, 473 U.S. at 494, 105 S.Ct. at 3284 (statement that " . . . plaintiff must seek redress for an injury caused by conduct that RICO was designed to deter is unhelpfully tautological.").

> . . . [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992) (citations omitted); *see also Salinas*, 522 U.S. at 56, 118 S.Ct. at 473; *Robinson*, 519 U.S. at 340-341, 117 S.Ct. at 846; *National Organization for Women*, 510 U.S. at 260-261, 114 S.Ct. at 805-806; *Turkette*, 452 U.S. at 593, 101 S.Ct. at 2534 (language of the RICO statute is the "most reliable evidence of [Congress'] intent . . . ."); *Khurana*, 130 F.3d at 153 (" . . . the provision for conspiracy violations was part and parcel of Congress's intent and plan and cannot be ignored.") (citing *Sedima*, 473 U.S. at 499, 105 S.Ct. at 3286).

II. REQUIRING PREDICATE ACT INJURY IS CONTRARY TO TRADITIONAL CONSPIRACY PRINCIPLES, WHICH ARE INCORPORATED BY CONGRESS INTO THE RICO STATUTE'S CONSPIRACY PROVISIONS.

A. Traditional Conspiracy Concepts Are Incorporated Into RICO's Conspiracy Provisions.

In the absence of a clear dictate to the contrary, when Congress legislates on a subject for which well-established legal principles exist, the settled principles are presumed to be "imported" into the statute. *See, e.g.,*

Kolstad v. American Dental Assoc., ___ U.S. ___, ___, 119 S.Ct. 2118, ___, ___ L.Ed.2d ___, 1999 WL 407481, *7 (1999) ("We assume that Congress, in legislating on punitive awards, imported common law principles governing this form of relief."); *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, ___ U.S. ___, ___, 119 S.Ct. 1322, 1327-1329, 143 L.Ed.2d 448 (1999) (presuming that traditional understandings regarding removal were not changed by Congress when it enacted 28 U.S.C. § 1446(b)); *United States v. Wells*, 519 U.S. 482, 491, 117 S.Ct. 921, 927, 137 L.Ed.2d 107 (1997) ("We do, of course, presume that Congress incorporates the common-law meaning of the terms it uses if those terms have accumulated settled meaning under the common law and the statute does not otherwise dictate.") (citations omitted); *Astoria Federal Savings & Loan Assoc. v. Solimino*, 501 U.S. 104, 108-110, 111 S.Ct. 2166, 2169-2171, 115 L.Ed.2d 96 (1991) (" . . . Congress is understood to legislate against a background of common-law adjudicatory principles.") (citations omitted). "Congress is, after all, not a body of laymen unfamiliar with the commonplaces of our law." *Callanan v. United States*, 364 U.S. 587, 594, 81 S.Ct. 321, 325, 5 L.Ed.2d 312 (1961) (citations omitted).

In *Salinas*, this Court applied this principle to conspiracies under § 1962(d):

> In interpreting the provisions of § 1962(d), we adhere to a general rule: When Congress uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition. *See Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 249-250, 96 L.Ed. 288 (1952). The relevant statutory phrase in § 1962(d) is "to conspire." We presume that Congress intended to use the term in its conventional sense, and certain well-established principles follow.

Salinas, 522 U.S. at 63, 118 S.Ct. at 476-477. Traditional conspiracy concepts should be applicable to the instant matter, as well.

B. Rejection of the Predicate Act Injury Requirement Is Warranted by Traditional Concepts of Conspiracy Law.

The gist of a conspiracy is the agreement itself. *United States v. Broce*, 488 U.S. 563, 570-571, 109 S.Ct. 757, 763, 102 L.Ed.2d 927 (1989) (citing *Braverman v. United States*, 317 U.S. 49, 53, 63 S.Ct. 99, 101, 87 L.Ed. 23 (1942)). "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Callanan*, 364 U.S. at 593, 81 S.Ct. at 325 (citations omitted). " . . . [A] conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable." *United States v. Rabinowich*, 238 U.S. 78, 85, 35 S.Ct. 682, 683-684, 59 L.Ed. 1211 (1915) (citations omitted). Once an overt act in furtherance of the conspiracy is committed, the conspiracy imputes liability to all conspirators. *Pinkerton v. United States*, 328 U.S. 640, 646-647, 66 S.Ct. 1180, 1183-1184, 90 L.Ed. 1489 (1946) (citations omitted). In fact, a person " . . . may be liable for conspiracy even though he was incapable of committing the substantive offense." *Salinas*,

522 U.S. at 64, 118 S.Ct. at 477 (citing *Rabinowich*, 238 U.S. at 86, 35 S.Ct. at 684). Moreover, the overt act, itself, need not be criminal or even unlawful, as long as it furthers the conspiracy. *See, e.g., Iannelli v. United States*, 420 U.S. 770, 785 n.17, 95 S.Ct. 1284, 1294 n.17, 43 L.Ed.2d 616 (1975) ("Indeed, the [overt] act can be innocent in nature, provided it furthers the purpose of the conspiracy.") (citations omitted); *Rabinowich*, 238 U.S. at 86, 35 S.Ct. at 684 (the overt act " . . . need not be of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy.") (citations omitted). "We have consistently held that the common law understanding of conspiracy does not make the doing of any act other than the act of conspiring a condition of liability." *United States v. Shabani*, 513 U.S. 10, 13-14, 115 S.Ct. 382, 384, 130 L.Ed.2d 225 (1994) (citations omitted).

Under traditional conspiracy law, no substantive crime need be committed whatsoever to establish liability. Thus, these traditional concepts further support the plain meaning of the language chosen by Congress in the RICO statute, that a person should have the right to sue for an injury caused by an overt act even where there are no predicate acts of racketeering committed.

C. This Court's Opinion in *Salinas* Supports This Result.

In *Salinas*, this Court made clear that the RICO conspiracy statute is actually "more comprehensive than the general conspiracy offense in § 371." *Salinas*, 522 U.S. at 63, 118 S.Ct. at 476. For § 1962(d), "[t]here is no requirement of some overt act or specific act . . . unlike the

general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an 'act to effect the object of the conspiracy.' " *Id.*

By its definition, a predicate act committed in furtherance of a RICO conspiracy would also qualify as an overt act. In *Salinas*, this Court confirmed that Congress "broadened conspiracy coverage by omitting the requirement of an overt act." *Id.*, 522 U.S. at 64, 118 S.Ct. at 477. Just as Congress " . . . did not, at the same time, work the radical change of requiring the Government to prove each conspirator agreed that he would be the one to commit two predicate acts," *Id.*, Congress also certainly did not work the radical change of requiring the actual commission of a predicate act, i.e., the underlying substantive crime, to establish civil liability for a RICO conspiracy.

In the present case, the Eleventh Circuit attempted to distinguish *Salinas* by drawing a distinction between criminal and civil conspiracies. The court stated that criminal conspiracies target agreements to engage in criminal activity, while civil conspiracies simply serve to impute liability. *Beck*, 162 F.3d at 1099 n.18 (CP App. 16-17). There is no basis for such a distinction, however, especially in the RICO context.

Criminal conspiracies, like civil conspiracies, serve to impute liability. *See Salinas*, 522 U.S. at 64, 118 S.Ct. at 477 (citing *Pinkerton*, 328 U.S. at 646, 66 S.Ct. at 1184 ("And so long as the partnership in crime continues, the partners act for each other in carrying it forward.")). Furthermore, the gist of civil conspiracies is the agreement itself, as

well, while adding the requirement of an injury. As the Seventh Circuit reasoned:

> It is true that an agreement to violate RICO, standing alone, cannot harm anybody. Some act in furtherance of that agreement (an "overt act," in legal parlance) is necessary. However, since RICO conspiracy does not require the actual commission of a predicate act, it follows that the act causing plaintiff's injury need not be a predicate act of racketeering.

Schiffels, 978 F.2d at 348-349; *see also Khurana*, 130 F.3d at 153. Moreover, as more fully discussed in Section IV(A), *infra*, the civil remedies provisions of RICO, which include civil remedies for conspiracies, are remedial in nature, and serve as another tool in the fight against organized criminal activity. In fact, *Salinas* has not been so restrictively read by lower courts, which have repeatedly applied it to civil proceedings. *See, e.g., Goren v. New Vision Internat'l, Inc.*, 156 F.3d 721, 730-731 (7th Cir. 1998); *BCCI Holdings (Luxembourg), S. A. v. Khalil*, ___ F.Supp.2d ___, ___, 1999 WL 432560, *36 (D.D.C. June 23, 1999); *Nystrom v. Associated Plastic Fabricators, Inc.*, ___ F.Supp.2d ___, ___, 1999 WL 417848, *7 (N.D. Ill. June 18, 1999); *Florida Software Systems, Inc. v. Columbia/HCA Healthcare Corp.*, ___ F.Supp.2d ___, ___, 1999 WL 254374, *5 (M.D. Fla. April 19, 1999); *Southern Intermodal Logistics, Inc. v. D.J. Powers Co.*, 10 F.Supp.2d 1337, 1361 n.45 (S.D. Ga. 1998) ("this Court will apply *Salinas* to this [civil] action.").

III. RICO'S PROXIMATE CAUSE REQUIREMENT, ARTICULATED BY THIS COURT IN *HOLMES*, IS THE APPROPRIATE LIMITING FACTOR, AND, UNDER SUCH AN ANALYSIS, BECK'S INJURIES ARE PROXIMATELY CAUSED BY THE DEFENDANT DIRECTORS' CONSPIRACY TO VIOLATE RICO.

Of course, not every injury flowing from every overt act should confer upon the victim a right to sue under RICO. An example of how this could be taken to an extreme was articulated by the Seventh Circuit:

> A more graphic example would be where a group of people conspire to operate an arson-for-hire enterprise. While driving to buy gasoline with which to start fires, one of the conspirators collides with and seriously damages another automobile. Although the damage to the automobile is injury to property "by reason of" an act to further the RICO conspiracy, it would be absurd to suggest that the owner of the damaged automobile could sue under RICO; other than "but for" causation, the damage has nothing to do with RICO.

Schiffels, 978 F.2d at 350. The appropriate manner to limit the chain of causation, however, is not for courts to write into the RICO statute a predicate act injury requirement that does not otherwise exist. Rather, it is to conduct the appropriate proximate cause analysis as articulated by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992). *See, e.g., Mendelovitz v. Vosicky*, 40 F.3d 182 (7th Cir. 1994).

In *Holmes*, the Court held that the language "by reason of" contained in § 1964(c) required that a defendant's

violation of § 1962 be the proximate cause of the plaintiff's injuries, not merely the "but for" cause. *Id.*, 503 U.S. 265-266, 268; 112 S.Ct. at 1316-1318. In so holding, this Court noted that the concept of "proximate cause" is not capable of precise definition, but does require "some direct relation between the injury asserted and the injurious conduct alleged." *Id.*, 503 U.S. at 268, 112 S.Ct. at 1318.

> Here we use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984). . . . Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover. *See, e.g.*, 1 J. Sutherland, *Law of Damages* 55-56 (1982).

Id.; *see also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477 n.13, 102 S.Ct. 2540, 2547 n.13, 73 L.Ed.2d 149 (1982).

The Court further explained that "directness of relationship" was a central element of the proximate cause analysis for at least three reasons:

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors. Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt

> complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

Holmes, 503 U.S. at 269-270; 112 S.Ct. at 1318-1319 (citing *Associate General Contractors of Cal. v. Carpenters*, 459 U.S. 519, 541-544, 103 S.Ct. 897, 910-912, 74 L.Ed.2d 723 (1983), remaining citations omitted).

In *Holmes*, the plaintiff's ("SIPC") injuries were not direct, and thus failed to meet the proximate cause requirement. There, the defendants, through a stock manipulation scheme, injured broker dealers. As a result, the broker dealers could not pay claims made by their customers. The resulting insolvency of the broker dealers (an intervening act) triggered SIPC's statutory duty to reimburse the ultimately injured customers. As "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step," *Id.*, 503 U.S. at 271-272, 112 S.Ct. at 1319-1320 (citations omitted), SIPC's injuries were not proximately caused by the defendants' RICO violations and, accordingly, SIPC had no right to sue under RICO.

Beck's injuries, however, were directly and proximately caused by the Defendant Directors' conspiracy to violate RICO. The injuries, in fact, occurred in "the first step." The Defendant Directors terminated Beck as an

overt act in furtherance of their conspiracy, causing an immediate, direct, foreseeable and cognizable injury.

The underlying purposes of the direct injury/proximate cause requirement demonstrate that the requirement has been satisfied in the present case. First, the precise amount of Beck's damages attributable to this violation are easily ascertainable – the value of his lost employment. Second, there is no need for any analysis, let alone a complicated one, for apportioning the damages caused to Beck, as opposed to others, by the RICO violation. Beck's damages are discreet and measurable. In fact, Beck is the only person who has suffered these direct injuries by virtue of the overt act of his termination. Last, Beck, and whistleblowers generally, are the first wave of potential deterrents of racketeering conduct. *See* Section IV(B), *infra* (discussion of value of whistleblowers in combating organized crime). While others may ultimately assert RICO claims based upon injuries from the predicate acts of racketeering themselves (here, state regulatory bodies and the shareholders of SIG ultimately initiated actions based, in part, upon Beck's uncovering the Defendant Directors' conspiracy), private attorneys general able and motivated to initiate action at the initial stages of a conspiracy may deter predicate acts, preventing the consequent injuries.

Further, Beck, fired by the Defendant Directors to perpetuate their conspiracy, is within the "zone of interests" RICO is meant to protect. *Holmes*, 503 U.S. at 287, 112 S.Ct. at 1328 (Scalia, J., concurring).

> [In a case such as this one], an employee is fired to prevent the employee from causing the conspiracy to unravel by disclosing the scheme.

> Unlike in *Holmes*, the employee has been directly injured by the defendant's RICO violation. Just as important, the act causing the injury has been committed to further the conspiracy and is directly related to the conspiracy's goals. This brings the injured employee well within the zone of interests RICO is meant to protect.

Schiffels, 978 F.2d at 351.

The Eleventh Circuit below attempted to support its holding with *Holmes*:

> In the context of RICO's substantive provisions, the Supreme Court has held that a plaintiff's injuries must have been proximately caused by acts of racketeering. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-269, 112 S.Ct. 1311, 1316-1318, 117 L.Ed.2d 532 (1992). We believe that this reasoning applies equally well to RICO's conspiracy provisions.

Beck, 162 F.3d at 1098 (CP App. 15); *see also Bowman*, 985 F.2d at 387-388 (same). This, however, misapplies *Holmes*. In *Holmes*, the Court held that a person injured in his business or property may sue under § 1964(c) for a violation of § 1962, as long as his injury was proximately caused *by that violation of § 1962*, not by the predicate acts themselves. *See also Sedima*, 473 U.S. at 496, 105 S.Ct. at 3285 (" . . . the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property *by the conduct constituting the violation.*" (emphasis added)). In the present case, the subsection of § 1962 involved is subsection (d), prohibiting RICO conspiracies. To satisfy the mandates of *Holmes*,

then, the injury suffered by Beck must have been proximately caused by the Defendant Directors' RICO conspiracy, not by any predicate acts. *See, e.g., id.; BCCI Holdings (Luxembourg), S.A. v. Khalil*, ___ F.Supp.2d ___, ___, 1999 WL 432560, *40 (D.D.C. June 23, 1999) ("Applying § 1964(c)'s causation element to a § 1962(d) violation requires that the conspiracy, rather than the substantive RICO violation or the predicate acts, be the proximate cause of plaintiffs' injuries.").

IV. THE INTENT OF THE RICO STATUTE, PUBLIC POLICY AND LEGISLATIVE HISTORY ALL SUPPORT A WHISTLEBLOWER'S RIGHT TO SUE WHEN TERMINATED AS AN OVERT ACT IN FURTHERANCE OF A RICO CONSPIRACY.

A. RICO Is to Be Liberally Construed to Effectuate its Remedial Purpose.

As this Court stated in *Sedima*:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, *see United States v. Turkette*, 452 U.S. 576, 586-587, 101 S.Ct. 2524, 2530-2531, 69 L.Ed.2d 246 (1981), but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub.L. 91-452, § 904(a), 84 Stat. 947.

Sedima, 473 U.S. at 497-498, 105 S.Ct. at 3285-3286. This remedial purpose was discussed in *United States v. Turkette*:

> The statement of findings that prefaces the Organized Crime Control Act of 1970 reveals the

pervasiveness of the problem that Congress was addressing by this enactment:

> "The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government

> are unnecessarily limited in scope and impact." 84 Stat. 922-923.
>
> In light of the above findings, it was the declared purpose of Congress "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Id.*, at 923. The various Titles of the Act provide the tools through which this goal is to be accomplished.

Turkette, 452 U.S. at 588-589, 101 S.Ct. at 2531-2532 (footnotes omitted).

"RICO's drafters likewise sought to provide vigorous incentives for plaintiffs to pursue RICO claims that would advance society's fight against organized crime." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 241-242, 107 S.Ct. 2332, 2345, 96 L.Ed.2d 185 (1987) (citing *Sedima*, 473 U.S. at 498, 105 S.Ct. at 3286). "While few of the legislative statements about novel remedies and attacking crime on all fronts . . . were made with direct reference to § 1964(c), it is in this spirit that all of the Act's provisions should be read." *Sedima*, 473 U.S. at 498, 105 S.Ct. at 3286 (citations omitted); *see also Shearson/American Express*, 482 U.S. at 240, 107 S.Ct. at 2345 ("The legislative history of § 1964(c) reveals the same emphasis on the remedial role of the treble-damages provision."). Congress intended to encourage private litigants to promote the policies underlying RICO with the "carrots" of treble damages and a provision awarding attorneys' fees only to a successful plaintiff (and not to a successful

defendant). *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 150-151, 107 S.Ct. 2759, 2764, 97 L.Ed.2d 121 (1987); *Northeast Women's Center v. McMonagle*, 889 F.2d 466, 474 (3d Cir. 1989).

Conspiracies are themselves a distinct evil that must be targeted:

> [C]ollective criminal agreement – partnership in crime – presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

Callanan, 364 U.S. at 593-594, 81 S.Ct. at 325; *see also United States v. Feola*, 420 U.S. 671, 693-694, 95 S.Ct. 1255, 1268, 43 L.Ed.2d 541 (1975) (discussing two independent values served by conspiracy law: "protection of society from the dangers of concerted criminal activity," and the fact that "the likelihood of commission of an act is sufficiently great" so as to justify intervention).

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

Pinkerton, 328 U.S. at 644, 66 S.Ct. at 1182 (citing *Rabinowich*, 238 U.S. at 88, 35 S.Ct. at 685).

Last, while organized crime was the prime target of Congress in enacting the RICO statute, the statute it designed went further. "The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." *National Organization for Women*, 510 U.S. at 260, 114 S.Ct. at 806 (citing *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 248, 109 S.Ct. 2893, 2905, 106 L.Ed.2d 195 (1989)).

B. RICO's Remedial Purpose Would Be Furthered by Whistleblowers Having a Right to Sue Thereunder for an Injury Caused by an Overt Act Committed in Furtherance of a RICO Conspiracy.

In addition to being called for by the clear language of the RICO statute, providing whistleblowers with a right to sue under RICO for the injuries sustained by them by reason of the overt act of their termination, committed in furtherance of the RICO conspiracy, also furthers RICO's remedial purpose.[3] There can be no doubt that whistleblowers serve an important function in today's society, strengthening the evidence-gathering process and providing a critical tool in the fight against crime. Public policy favors rewards, not punishment, for refusing to participate in, or blowing the whistle on racketeering activity. Whistleblowers may expose an otherwise unknown pattern of racketeering to the appropriate authorities, ultimately preventing predicate acts from occurring. In fact, even the Eleventh Circuit, in *Beck*, acknowledged that a " 'whistle blower' claim such as

---

[3] There is no legislative history directly regarding the specific issue presented by this Petition, § 1964(c)'s civil remedies for conspiracies to violate RICO. *See, e.g.*, House Rep. No. 91-1549, *U.S. Code Cong. and Admin. News* 1970, pp. 4007, 4033 (stating only that " . . . subsection (d) makes conspiracy to violate (a), (b), or (c) equally subject to the sanctions of sections 1963 and 1964, below."). Furthermore, despite the incorporation of antitrust principles into other sections of RICO, there is no analogous antitrust provision on the issue presented here. This is especially true because, under the antitrust laws, there is not a distinct provision forbidding conspiracies. *See* 15 U.S.C. § 1.

Beck's could perhaps have a deterrent effect on racketeering . . . ." *Beck*, 162 F.3d at 1099 (CP App. 16).

The following example illustrates how the applicable policies are advanced where a civil action pursuant to § 1964(c) exists for an employee who is terminated as an overt act in furtherance of a RICO conspiracy:

> Suppose several racketeers were to decide to take over a construction company. Suppose they said, "Let's agree to operate this company in violation of the law. Let's rig bids, bribe officials, intimidate and threaten competitors not to bid on jobs and let's travel in interstate commerce to accomplish all of this. And, oh yes, let's fire all of the honest employees in the company, so we won't have any opposition in accomplishing our scheme.
>
> . . . The Court believes that Congress intended to afford the discharged employees a civil remedy in such a situation and that the Supreme Court following *Sedima* would so interpret the RICO statute.

Williams v. Hall, 683 F.Supp. 639, 644 (E.D. Ky. 1988), *criticized*, *Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151 (6th Cir. 1990). Any other result would " . . . assure employers that when troublesome employees threaten to disclose the commission of RICO violations, those employees can be threatened with termination to keep such violations hidden from public view . . . , ensur[ing] that fewer instances of fraud will be uncovered and that Congress's intent in enacting the RICO statute will be frustrated." *Bowman*, 985 F.2d at 389 (Heany, J., dissenting).

C. A Concern That This Result Would Allow a Flood of New Lawsuits by Artful Pleaders Does Not Justify Rewriting the Statute.

At the heart of some of the decisions holding that an actionable overt act committed in furtherance of a RICO conspiracy must also be a predicate act is the concern that, absent such a requirement, a flood of new lawsuits will be brought by "artful pleaders." *See, e.g., Beck*, 162 F.3d at 1099 (" . . . requiring proof of direct injury by racketeering activity for section 1962(a)-(c), but not for section 1962(d), would . . . allow plaintiffs to circumvent the requirements of the first three subsections simply by alleging a conspiracy."); *Bowman*, 985 F.2d at 388 ("While this might appear to collapse a civil RICO suit based on a § 1962(d) conspiracy into those suits based on substantive RICO violations as delineated in § 1962(a)-(c), any other result would render this decision merely a guide to the artful pleader."). Such a concern, however, does not justify rewriting the RICO statute to incorporate a requirement that does not exist.

Congress determines what actions are available to private litigants. An argument that the statutory language chosen by Congress opens an avenue for a plaintiff to bring a claim " . . . is not a legal argument at all; it addresses a policy issue that Congress has already resolved." *Cannon v. University of Chicago*, 441 U.S. 677, 709, 99 S.Ct. 1946, 1964, 60 L.Ed.2d 560 (1979).

This "floodgates" argument has been raised and rejected by this Court in connection with civil RICO on numerous occasions. In *Sedima*, this Court noted that "[u]nderlying the Court of Appeals' holding [requiring a

"racketeering injury"] was its distress at the 'extraordinary, if not outrageous,' uses to which civil RICO has been put." *Sedima*, 473 U.S. at 499, 105 S.Ct. at 3286 (citation omitted). The Court rejected the imposition of a racketeering injury requirement, deferring to the requirements Congress chose to place in the statute, as drafted. *Id.*, 473 U.S. at 499-500, 105 S.Ct. at 3286-3287 ("Yet this defect – if defect it is – is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it . . . ."). Similarly, in *National Organization of Women*, the Court of Appeals introduced the requirement of an economic motive for an action based upon § 1962(c), in part to limit the breadth of the use of that section. *Id.*, 510 U.S. at 258, 114 S.Ct. at 804. This Court again rejected this requirement, finding that the statute was "unambiguous," and that "Congress ha[d] not, either in the definitional section or in the operative language, required that an 'enterprise' in § 1962(c) have an economic motive." *Id.*, 510 U.S. at 261, 114 S.Ct. at 805-806; *see also Turkette*, 452 U.S. at 580-581, 101 S.Ct. at 2527 (rejecting lower court's requirement that "enterprise" be confined to "legitimate" enterprises).

Moreover, the concerns about widening the floodgates of RICO litigation raised in cases such as *Bowman* and *Beck* have not been borne out empirically in the 1990's. From 1990 through 1998 (using a calendar year ending September 30), the number of *total civil cases* filed in the United States District Courts has generally increased: from 219,051 (1990), 210,890 (1991), 230,509 (1992), 229,850 (1993), 236,391 (1994), 248,335 (1995),

269,132 (1996), 272,027 (1997), to 256,787 (1998). Administrative Office of the United States Courts, L. Mecham, *Judicial Business of the United States Courts* [Reports from 1994, 1995, 1996, 1997 and 1998], Table C-2A (U.S. District Courts – Civil Cases Commenced by Nature of Suit). During that same period, however, the number of *civil RICO cases* filed has actually dropped: from 1,138 (1990), 972 (1991), 897 (1992), 903 (1993), 828 (1994), 900 (1995), 849 (1996), 840 (1997), to 785 (1998). *Id.* These statistics include cases filed pursuant to the split in authority on the question presented by this Petition. Certainly, following the language of the RICO statute in the instant case will not have an impact on these figures. Regardless, as discussed in Section III, *supra*, such suits by whistleblowers would be limited by the appropriate proximate cause analysis mandated by *Holmes*, and, as discussed in Section IV(B), *supra*, these suits would further the remedial purpose of the RICO statute.

CONCLUSION

Beck suffered unique, ascertainable and direct damages when he was terminated as an overt act in furtherance of an ongoing conspiracy to violate RICO's substantive provisions (that continued for almost two years after he was terminated). Beck's injuries were thus proximately caused by the Defendant Directors' violations of § 1962(d).

At the outset of its decision below, the Eleventh Circuit stated that this case "hinged" on the question of whether " . . . a plaintiff bringing a civil RICO conspiracy

claim [must] prove that the overt act (in furtherance of the conspiracy) by which he was injured was an 'act of racketeering'?" *Beck*, 162 F.3d at 1093 (CP App. 2). As more fully set forth in the foregoing sections, this question should be answered in the negative – a plaintiff bringing a civil RICO conspiracy claim need only show that he directly suffered injuries proximately caused by an overt act committed in furtherance of the conspiracy, regardless of whether that overt act was also a predicate act of racketeering. Beck has made that showing and, therefore, should have a right to sue under § 1964(c) for his injuries that were proximately caused by the Defendant Directors' violations of § 1962(d). Accordingly, for the foregoing reasons, the judgments entered below should be reversed and the case should be remanded for further proceedings, including trial.

Respectfully submitted,

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FILED
AUG 23 1999
OFFICE OF THE CLERK

No. 98-1480

In The

Supreme Court of the United States

ROBERT A. BECK, II,

Petitioner,

vs.

RONALD M. PRUPIS, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Is the tort of wrongful discharge a sufficient overt act to convert standing on a plaintiff alleging violation of 18 U.S.C. § 1962(d)?

2. Was not the Court of Appeals correct in holding that the plaintiff did not prove a pattern of racketeering activity nor that the plaintiff's alleged injury under 18 U.S.C. § 1964(c) was proximately caused thereby?

3. Is not the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961-1968 (1994) constitutionally invalid due to vagueness?

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SUMMARY OF ARGUMENT

Beck was terminated pursuant to recommendations of an independent consultant under the terms of a contract which contemplated dismissal. At most, Beck may have a tort action under Florida statutes or common law. Beck has shown no overt act committed in furtherance of an alleged conspiracy to violate RICO and Beck was, therefore, not injured.

The Eleventh, First, Second, Eighth and Ninth Circuits are correct in holding that the overt act by which a plaintiff claims injury must be an "act of racketeering" and that wrongful discharge of an employee is not such an act, not being so designated under 18 U.S.C. § 1961(1). It is, therefore, not within the "zone of interest" to be regulated by the statute.

Beck was thus unable to prove that a predicate act was the proximate cause of his alleged injuries under *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).

Persons of ordinary intelligence could not perceive under the language of RICO that termination of an employee under a written contract, even if wrongful, could constitute a pattern of racketeering activity based on alleged mail and wire fraud. The statute is, therefore, too vague to be enforced and constitutionally invalid.

The Court of Appeals, in this case, was correct and should be affirmed.

ARGUMENT

POINT I

THE TORT OF WRONGFUL DISCHARGE OF AN EMPLOYEE IS NOT A SUFFICIENT OVERT ACT TO CONFER STANDING ON THE PLAINTIFF'S ALLEGATIONS OF A VIOLATION OF § 1962(d)

The plaintiff in this case claims that he was a "whistle blower" who was wrongfully discharged. As pointed out by the Court of Appeals (Petition for Writ of Certiorari App. 10) the plaintiff's employment was governed by a written contract which contemplated its termination either for cause or not for cause.

The plaintiff and the subject corporation were both domiciled in Florida, whose State legislature enacted laws to provide wrongfully discharged "whistle blower" employees with recourse. (*Fla. Stat. Ann.* 112.3187 prohibits adverse action against employees who disclose an employer's malfeasance.) This statute, therefore, appears to establish a right of action for wrongful discharge and to protect employees from retaliation by an angered employer.

It has been held that in order to have standing to sue the plaintiff must show: (1) that the alleged wrongful conduct has caused injury, and (2) that the interest sought to be protected is within the "zone of interest" to be regulated by the statutory provision in question. *Warth v. Selvin,* 422 U.S. 490, 498-501 (1975).

Wrongful discharge of an employee is not among the enumerated acts that constitute racketeering activity under RICO 18 U.S.C. § 1961(1) (1994).

The District Court in the case of *Schiffels v. Kemper Financial Services, Inc.*, 767 F.Supp. 909 (N.D. Ill. 1991), *rev'd*, 978 F.2d 344 (7th Cir. 1992) so held and dismissed the plaintiff's complaint.

Although reversed by the Court of Appeals of the 7th Circuit, the District Court's approach was in accord with decisions in the First Circuit, *Miranda v. Ponce Federal Bank*, 948 F.2d 41 (1st Cir. 1991) the Second Circuit, *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21 (2nd Cir. 1990), the Eighth Circuit, *Bowman v. Western Auto Supply Co.*, 985 F.2d 383 (8th Cir.), *cert. den.*, 508 U.S. 957, 113 S.Ct. 2459 (1993), the Ninth Circuit, *Reddy v. Litton Industries, Inc.*, 912 F.2d 291 (9th Cir. 1990), *cert. den.*, 112 S.Ct. 332 (1991); and the Eleventh Circuit, *O'Malley v. O'Neil*, 887 F.2d 1157 (11th Cir. 1989).

This case squarely frames the issue for a decision by this Court.

The above cases were cited by the Court of Appeals in the present case (Petition for Writ of Certiorari. 15 fn. 16) as constituting the majority of circuits considering this issue who have concluded that discharge of an employee for whistle blowing does not satisfy RICO's proximate cause requirement set down by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).

The Court of Appeals in this case correctly pointed out that the express target of RICO was racketeering activity and that "only those injuries that are proximately caused by racketeering activity should be actionable under the statute" . . . citing *Hecht, supra.* ("Congress did not deploy RICO as an instrument against all unlawful

acts. It targeted only predicate acts catalogued under Section 1951(1)") . . . "If there is no racketeering activity . . . there can be no violation of the provisions of this title." (Petition for Writ of Certiorari App. 15-16.)

With the express target of the enactment of RICO in mind – racketeering activity – the Court of Appeals correctly held that the requirement of this Court that plaintiff's injuries must have been proximately caused by acts of racketeering in the context of RICO's substantive provisions in *Holmes, supra* applied equally to the conspiracy provision.

This reasoning is in accord with that expressed by the Chief Justice. ("The legislative history of the RICO Act strongly suggests that Congress never intended that civil RICO should be used, as it is today, in ordinary commercial disputes far divorced from the influences of organized crime.") (Wall St. J. May 19, 1989, Section 1, page 14).

The simple act of discharging an employee does not constitute racketeering activity as defined in RICO and thus does not constitute "predicate acts" within the "zone of interest" to be regulated under RICO. *Warth, supra.*

In this regard the reasoning of the Court of Appeals is correct and should be affirmed.

POINT II

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE PLAINTIFF DID NOT PROVE A PATTERN OF RACKETEERING ACTIVITY NOR THAT THE PLAINTIFF SUFFERED DIRECT INJURY UNDER 18 U.S.C. § 1964(c)

In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992) this court (in an opinion by Justice Souter in which the Chief Justice and Justices Blackmun, Kennedy and Thomas joined, and in which Justices White, Stevens and O'Connor joined except for Part IV, as to which Justices Scalia and O'Connor filed concurring opinions) held that RICO contains a proximate cause requirement mirroring that of the Sherman and Clayton Acts. This requirement forces the plaintiff to demonstrate a direct relation between the injury suffered and the alleged injurious conduct.

The Court of Appeals viewed the proposed evidence in a light most favorable to Beck (App. 8) since the case was reviewed by the Court of Appeals after a motion for summary judgment had been granted by the District Court. In his brief Beck misconstrued this view of the evidence in his favor as a finding of fact. (Petitioner's Brief, p. 2)

The Court of Appeals concluded that "for each alleged RICO violation in this case Beck has failed to produce evidence to support at least one of the essential elements of a RICO claim based on mail and wire fraud. For this reason we affirm the District Court's grant of summary judgment" (App. 9).

Each one of Beck's claims, (1) that the defendant's failed to inform Beck of his proposed termination, (2) defendant's failure to inform him of alleged illegal activities, and (3) defendant's alleged creation of false financial statements, all lacked essential elements of intent to injure Beck such as would constitute proximate causation between the alleged injury and Beck's losses. The Court noted:

> " 'But for' causation is insufficient to sustain a claim of fraud. Instead proximate cause is required meaning that this omission must have been a 'substantial factor' in his decision making". (App. 11)

The Court concluded:

> "Beck has presented no evidence (other than the 'but for' testimony)". (App. 11)

Once again, in regard to Beck's allegations that RICO was violated because allegedly fraudulent reasons were created for termination of his employment on the basis of a consulting group's false allegations regarding Beck's job performance, the Court of Appeals correctly noted Beck was not injured through reliance on the report because the report was rendered to the directors of SIG and, therefore, any alleged misrepresentations in the report, could not be the proximate cause of Beck's injury. (App. 13).

Reduced to its basic elements, the Court of Appeals correctly perceived that Beck's claim was simply that the corporation ought to have repurchased his stock and breached its contract by not doing so. Such an allegation constitutes only a common law breach of contract not a

federal statutory offense based on the commission of mail and wire fraud and, therefore, "Beck's firing is not an act of racketeering under RICO."

As to Beck's conspiracy claim under 18 U.S.C. § 1962(d) the Court of Appeals found the proximate cause requirements in *Holmes, supra,* although in the context of RICO's substantive provisions, to be equally applicable to RICO's conspiracy provisions. (App. 15). The Court reasoned that:

> "The conspiracy provision allows persons who are responsible for an injury, but did not actually participate in the jury-causing activity, to be held liable." (App. 16)

and reasoned that to require proof of a direct injury by racketeering activity for §§ 1962(a)-(c) but not for § 1962(d) would be logically inconsistent and would allow plaintiffs to circumvent the requirements of §§ 1962(a)-(c) by simply alleging a conspiracy under § 1962(d) (App. 17).

The Court of Appeals, therefore, concluded that since Beck had presented no evidence that his termination was a result of racketeering activity directed towards him, the District Court's grant of summary judgment on Beck's RICO conspiracy claim was correct and was, therefore, affirmed. (App. 18).

This Court should also affirm.

POINT III

RICO IS CONSTITUTIONALLY INVALID DUE TO VAGUENESS

The United States Constitution Amendment V holds that no person shall ". . . be deprived of life, liberty, or property, without due process of law."

In order to meet the due process requirements of the Constitution it has been held that a statute must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and that it must contain standards of enforcement clear enough to guide courts and juries in determining what the offense is so that application of the law would not be arbitrary and discriminatory. *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

These requirements have been held by this court to be equally applicable to civil as well as criminal laws. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284 (1954).

In *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989) this Court held that the civil application of penal statutes, such as RICO, must satisfy the certainty requirements of criminal laws. In *H.J., Inc., supra*, Justice Scalia expressed the view in his concurring opinion (in which the Chief Justice, Justice O'Connor and Justice Kennedy joined) that court decisions have provided little guidance as to the meaning of the "pattern" requirement in RICO, and have made it more rather than less difficult for potential defendants to know whether their conduct may be covered under RICO. Justice Scalia noted the "Kaleidoscope of circuit positions" following *Sedima,*

S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) (holding that two isolated acts of racketeering activity, sporadic activity, or two acts of racketeering activity without more, would not be enough to constitute a pattern noting that the term "pattern" requires a showing of continuity plus relationship.) *Id.* at 496. Justice Scalia further noted that "There is no reason to believe that the Courts of Appeals will be any more unified in the future than they have in the past regarding the content of this law." *H.J., Inc., supra* at 255.

As applied to this case, which involves a dispute concerning whether or not a contract was breached, the situation is far removed from the "zone of interest" which Congress must have envisioned as being within RICO's scope of coverage. This is not a case where, even assuming that the allegations in the complaint could be proved, would show that the "pattern" requirement had been clearly satisfied regardless of how narrow the interpretation of the term "pattern" may be, the alleged "predicate act," mail and wire fraud, being isolated and sporadic, not regularly recurring.

Accordingly, this Court could conclude that persons of ordinary intelligence in the defendant's situation would not have had adequate notice that the alleged "mail and wire fraud" constituted a pattern of racketeering activity under RICO.

It would be appropriate for this court to find that "the pattern requirement" in RICO is unconstitutionally vague as applied to these defendants. Such claims being

unconstitutionally vague, the RICO claims should be dismissed.

CONCLUSION

For the reasons set forth herein, the Court of Appeals was correct and should be affirmed and the RICO statute should be declared unconstitutional for vagueness.

Respectfully submitted,

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Supreme Court, U.S.
FILED
SEP 17 1999
OFFICE OF THE CLERK

No. 98-1480

IN THE

Supreme Court of the United States

ROBERT A. BECK, II,

Petitioner,

v.

ROBERT M. PRUPIS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether a person has standing to assert a civil RICO conspiracy claim under 18 U.S.C. §§ 1962(d) and 1964(c) where:

(i) he does not have viable substantive claims under 18 U.S.C. § 1962(a)-(c);

(ii) he was not injured by reason of "racketeering activity," as defined in 18 U.S.C. § 1961(1); and

(iii) the alleged overt act was the termination of his employment.

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COUNTERSTATEMENT OF THE CASE

This case arises from the termination of the employment of Robert A. Beck, II by Southeastern Insurance Group, Inc. (SIG), a Florida-based insurance holding company. Beck sued several of SIG's directors, asserting substantive RICO claims under 18 U.S.C. § 1962(a)-(c) and a RICO conspiracy claim under 18 U.S.C. § 1962(d). After discovery, the district court granted defendants' motion for summary judgment on all the RICO claims. The Eleventh Circuit affirmed. Beck petitioned for certiorari only with respect to the entry of summary judgment on the RICO conspiracy claim.

The circuits are divided as to whether a terminated "whistleblower" has standing to assert a RICO conspiracy claim when the alleged overt act was not itself "racketeering activity" under 18 U.S.C. § 1961(1). The Eleventh Circuit and four other circuits hold that there is no viable RICO conspiracy claim unless the alleged overt act was itself a RICO "predicate act."[1] Two circuits disagree, holding that a whistleblower has standing to assert a RICO conspiracy claim even if the overt act was merely the termination of employment.[2]

---

1. *See Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 48 (1st Cir. 1991); *Hecht v. Commerce Clearing House*, 897 F.2d 21, 25 (2d Cir. 1990); *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir.), *cert. denied*, 508 U.S. 957 (1993); *Reddy v. Litton Industries*, 912 F.2d 291, 295 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991); *Beck*, Pet. App. at 14-18. "Racketeering activity" is referred to in the decisions as "predicate offense" or "predicate act." *See, e.g., Atlas Pile Driving Co. v. Di Con Fin. Co.*, 886 F.2d 986, 990 (8th Cir. 1989).

2. *See Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1169 (3rd Cir. 1989) and *Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344, 349 (7th Cir. 1992). In *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 153 (5th Cir. 1997), *judgment vacated as moot*, (Cont'd)

A. Background.

From 1983, when it was founded, until January 1990, when it declared bankruptcy, SIG owned three insurance subsidiaries that wrote surety bonds for construction contractors. Respondents Leonard Bellezza, William Paulus, Jr., Harry Olstein and Ernest J. Sabato were four of SIG's directors.

In its early years, SIG was a small, thinly capitalized company that issued surety bonds of modest size. In August 1986, SIG raised $30 million of new capital through a private placement offering that enabled it to issue larger bonds, with the expectation of generating greater earnings. The long-term goal was to take SIG public — a strategy designed to allow SIG's original shareholders, including Beck, to sell their SIG stock as part of an initial public offering (IPO).

Beck served as SIG's president from 1983 to May 1988. Under his employment contract, Beck was responsible for developing and preparing SIG's budgets and financial forecasts, monitoring SIG's financial performance, and reporting SIG's financial condition to the Board of Directors and to the Florida Department of Insurance. J.A. 97, ¶ 3.1(a); R5-138-Exh. 4 at 86. Accordingly, Beck provided management reports to the Board and signed and filed quarterly financial reports with the Florida Department of Insurance, all of which showed SIG's insurance subsidiaries to be growing and profitable. *See generally* R5-138-Exh.C.

In May 1988, because of this reported success, and in preparation for a possible IPO, the Board hired Firemark

(Cont'd)
119 S. Ct. 442 (1998), the Fifth Circuit also aligned itself with the minority. However, because this Court vacated the judgment in that case, the Fifth Circuit's opinion has no "precedential effect." *See County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979).

Consultants, Inc. (Firemark), an independent insurance consultant, to conduct a due diligence investigation of SIG's operations and financial condition. The Board gave Firemark carte blanche authority to investigate and assess SIG's "operations, procedures, staff and management." J.A. 117.

Firemark conducted the investigation, reviewing financial data and interviewing 72 SIG employees from every department, level and job function. J.A. 117. On May 12, 1988, Firemark presented an oral report to SIG's Board, later memorialized in a written report. Contrary to the information previously given by Beck to the Board, Firemark reported that SIG was in organizational and financial disarray. It found serious deficiencies in all phases of SIG's operations, including a detrimental "cash-flow" underwriting policy that allowed high-risk bonds to be issued to generate premiums with little regard to potential claims. J.A. 118, 121.

Firemark also found a general lack of managerial ability or knowledge of the insurance and surety business at the highest levels; a lack of budgetary controls and underwriting guidelines; a lack of formal personnel guidelines and salary administration; inexperience at all levels of staff and management; the existence of "cliques, in-circles, camps and favoritism;" and grossly inadequate claims procedures. J.A. 117-21. Firemark concluded that SIG's Board had been seriously misled by management's past reports of profitability, stating:

> . . . SIG must frankly be considered a turnaround company. To refuse to acknowledge the number and gravity of problems, or to fail to understand the complexity and difficulty of establishing a profitable operation is shortsighted and dangerous. We are not faced with the task of restoring highly profitable

> results to an established company that has stumbled. Southeastern has yet to build an infrastructure, and in general has not established a solidly profitable business. Any profits reported in the past are highly suspect, considering previous management's clearly demonstrated propensity to delude itself and the Board.

J.A. 125-26.

Firemark made numerous recommendations, including the removal of SIG's entire senior management team — Beck (president), Ronald Prupis (CEO), Linda Burton (senior underwriting officer) and Carl Shible (executive vice president of underwriting) — for substandard managerial practices. *See* J.A. 122-23, 126. Obviously, Beck was not singled out. On May 13, 1988, in reliance on Firemark's oral recommendations, SIG's Board voted unanimously to terminate Beck, Prupis and Burton and to demote Shible. Respondents themselves then reported Firemark's findings and the termination of senior management to the Florida Department of Insurance and SIG's shareholders. *See* R5-138-Exh.E, ¶¶ 92-94, 106-151.

Beck's employment contract permitted SIG to terminate him for an "inability or substantial failure to perform the material duties" assigned to him. J.A. 104, ¶ 7.1(c). If Beck was "improperly terminated" — a phrase defined to mean "termination for any reason other than set forth" in the contract — he had the right to sell his SIG stock back to SIG at fair market value. J.A. 105, ¶ 7.2. According to Beck, one of the reasons SIG fired him was to avoid this stock repurchase obligation. J.A. 58, 70-72, 139, 147; Pet. at 3.

In his Complaint,[3] Beck asserted RICO claims against SIG's officers and directors, including Respondents (collectively, the SIG defendants). He claimed violations of each of RICO's substantive sections, 18 U.S.C. § 1962(a), (b) and (c), and of RICO's conspiracy section, 18 U.S.C. § 1962(d).

B. The Substantive RICO Claims.

In his brief, Beck misleadingly quotes what, "[b]ased upon the evidence, . . . the Eleventh Circuit found." Petitioner's Brief on the Merits (Pet. Br.) at 2. His quotation is from a part of the court's opinion describing allegedly illegal activities as if they were undisputed facts. Pet. App. 2-4. But neither the district court nor the Eleventh Circuit made any findings of fact; rather, both simply concluded that even if the facts were as alleged by Beck, he lacked RICO standing. Indeed, the Eleventh Circuit later noted that because the appeal was from a grant of summary judgment, it had "viewed all evidence in favor of the nonmoving party (i.e., Beck)." Pet. App. at 8.

In his Complaint and RICO case statement, Beck listed approximately 50 predicate acts supporting his claim of a pattern of racketeering activity, none of which were directed at him; they were directed solely at third parties. J.A. 76-83; J.A. 149-56. Specifically, Beck alleged numerous acts of extortion, "looting," mail fraud and wire fraud. J.A. 61-81, 95-96, 112-113, 138-43. The "extortion" was the charging of

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3. Beck's RICO claims were initially asserted as a crossclaim in a shareholders derivative suit filed against him and other SIG officers and directors in the United States District Court for the District of New Jersey. J.A. 54. In March 1991, the federal district court in New Jersey severed Beck's crossclaim and transferred it to the Southern District of Florida pursuant to a forum-selection clause in his employment contract. *See* Pet. App. 2 n.1. For ease of reference, Beck's crossclaim is referred to in this brief as the "Complaint."

fees by a SIG subsidiary, Contractors Performance Corporation (CPC), to monitor the job performance of higher-risk contractors who purchased surety bonds, in order to fend off potential defaults. The "looting" was the execution of a reinsurance pooling agreement that allowed the insurance subsidiaries to pool claim payments, and also included the transfer of funds from the insurance subsidiaries to SIG to enable it to repay legitimate loans made by some of the defendants and First Fidelity Bank. J.A. 60-61, 139, 141, 144-145. The "mail and wire fraud" consisted of the SIG defendants' issuance of false financial statements to the insurance regulators and misleading financial projections to First Fidelity Bank to induce it to loan SIG $7.5 million. J.A. 60, 80, ¶¶ 108-09, 111; J.A. 149-56.[4]

Beck acknowledged below that he had no standing to assert a RICO claim based upon these alleged predicate acts directed at third parties. He alleged that he was injured indirectly, however, because defendants' alleged activities "resulted in the failure of SIG" and "caused the value of Beck's SIG stock to greatly depreciate." J.A. 162, ¶ 16; J.A. 148, ¶ 4.a.iv. He also alleged that he was "fraudulently induced" to purchase a SIG stock/debenture unit and to guarantee the $7.5 million First Fidelity loan. J.A. 72-73, 75-76, 148, 162.

C. The RICO Conspiracy Claim.

In his RICO conspiracy claim, Beck alleged that the SIG defendants conspired with Firemark to create false causes for his termination. J.A. 70, ¶¶ 51-52. The alleged conspiracy was designed to deprive Beck "of the money due and owing to him under his employment contract with SIG," which required

4. The remaining predicate acts were five telephone calls, allegedly related to a plan to mislead Beck into believing that the improper activity had been attributed to others, that it would be corrected and that he would not be terminated. J.A. 81-82, ¶¶ 119-23.

(at his option) the repurchase of his stock at fair market value if he was "improperly terminated." J.A. 72, ¶ 59; *see* J.A. 105, ¶ 7.2. Beck also claimed that the SIG defendants conspired to terminate him in retaliation for allegedly having blown the whistle on the allegedly illegal activities and because he refused to participate in those activities. J.A. 69-70, ¶¶ 49-54; Pet. at 3. He thus claimed that his termination was an overt act in furtherance of the alleged RICO conspiracy. J.A. 67-72, ¶¶ 43-60; J.A. 87, ¶ 144.

Although Beck alleged that SIG hired Firemark to fabricate criticisms of his performance to justify his termination for cause, the federal district court in New Jersey dismissed Beck's RICO claim against Firemark. It found no evidence of any conspiracy and nothing false about the Firemark report:

> It cannot be said that the [Firemark] Report itself is an objective manifestation of the [conspiracy] when Beck has failed to allege how the contents of the Report were false. Moreover, the questionable conduct described in the Report is attributed solely to neither Beck nor any other member of management. Additionally, *it is illogical for Beck to claim that the Report was false when it documents the same misconduct that Beck asserts occurred at SIG.*
>
> * * *
>
> Beck has nowhere provided any factual support for the allegation that the Report was false or that it blamed him exclusively for the misconduct at SIG. Although the Report does recommend Beck be terminated, it does not explicitly attribute any wrongdoing to Beck alone. If anything, the Report suggests that much of the management of SIG was

> to blame. The Report recommends termination or investigation of numerous officers or directors in addition to Beck.

R5-138-Exh.L at 44-45, 51 (emphasis added).

Beck did not appeal the dismissal of Firemark but nevertheless pressed his claims against the SIG defendants, whom he claims were Firemark's alleged co-conspirators.

D. Respondents' Summary Judgment Motion.

After the close of discovery, the SIG defendants moved for summary judgment. In opposing the motion, Beck submitted nine exhibits purportedly related to his claim that the SIG defendants conspired with Firemark to fabricate causes for his termination. *See* R5-163 at 17-18 (citing R5-161-Exhs. 12 & 16; R5-162-Exhs. 36, 39, 42-44, 47-48). Those exhibits showed, however, that Beck's conspiracy claim was factually baseless.

Five of the exhibits made no mention of Firemark at all; they merely consisted of hearsay statements of three SIG employees concerning rumors of Beck's possible termination and Ronald Prupis's (SIG's CEO) attempt to limit Beck's power. None of those five exhibits even remotely tended to prove that Respondents secretly hired Firemark to fabricate causes for Beck's termination.

Two of the remaining four exhibits consisted of multi-layered hearsay statements by former Firemark employees, to the effect that Firemark recommended Beck's termination because Joanne Morrissey (Firemark's president) wanted Beck's job. Quite apart from the incompetent nature of that evidence, even if it were true that Morrissey wanted Beck's job, there was no evidence that Respondents knew of her career ambitions. Nor did her alleged motive have anything to do with alleged RICO predicate acts or the claimed RICO conspiracy. The final

two exhibits consisted of deposition testimony of a SIG employee and of Michael Morrissey, another Firemark principal, whose testimony did not support Beck's claim of a conspiracy to fabricate reasons to justify Beck's termination.

The district court granted Respondents' summary judgment motion, holding that Beck lacked RICO standing to sue as a creditor, guarantor, shareholder and/or terminated whistleblower because his injuries were not proximately caused by the alleged misconduct. Pet. App. at 32-46.

E. The Eleventh Circuit Decision.

The Eleventh Circuit affirmed the summary judgment against Beck as to all of his RICO claims. As for his substantive claims under 18 U.S.C. § 1962(a)-(c), the court held that Beck lacked RICO standing because his alleged injuries were derivative of those suffered by SIG, and because there was no evidence that Beck relied upon any misstatements or that Respondents intended to deceive him. Pet. App. at 9-14.

As for Beck's conspiracy claim under § 1962(d), the court held that a terminated employee lacks standing to pursue a RICO conspiracy claim because his injury is not proximately caused by predicate acts of racketeering. Pet. App. at 14-18. The court reasoned that "RICO was enacted with an express target — racketeering activity — and only those injuries that are proximately caused by racketeering activity should be actionable under the statute." *Id.* at 15-16, *citing Holmes v. Securities Inv. Protection Corp.*, 503 U.S. 258, 265-69 (1992).

The court also explained that the minority view would eviscerate § 1962(a)-(c), because it would allow plaintiffs to circumvent the standing limitations of those subsections "simply by alleging a conspiracy." Pet. App. at 16-17. Finally, the court rejected Beck's argument that the majority view would render § 1962(d) superfluous, since under that view the conspiracy

provision still "allows persons who are responsible for an injury, but [who] did not actually participate in the injury-causing activity, to be held liable" as joint tortfeasors. Pet. App. at 16-17 & n.18.

F. Other Litigation Involving SIG.

During the pendency of this action, the direct victims of the predicate acts alleged by Beck sued the SIG defendants and others responsible for their losses. First, after SIG defaulted on the $7.5 million loan, First Fidelity sued Beck and the SIG defendants, all of whom had personally guaranteed the loan. First Fidelity obtained a $3.3 million judgment against the SIG defendants and Beck, all of which was paid by the SIG defendants. R5-138-Exhs.X&Y.

Second, SIG shareholders filed a RICO derivative action against Beck and the SIG defendants alleging the same pattern of racketeering activity alleged by Beck. R5-138-Exh.F, ¶¶ 73-75, 106-16. After SIG declared bankruptcy, its bankruptcy trustee took over the derivative action.

Third, the Florida and New Jersey departments of insurance, as receivers for SIG's insurance subsidiaries, sued the SIG defendants for damages resulting from various transfers of funds among SIG and its subsidiaries. R5-138-Exhs. M, O. The receivers alleged that the reinsurance pooling agreements among the insurance subsidiaries — which allowed them to pool the payment of claims — and the transfer of funds by the subsidiaries to SIG to enable it to repay legitimate loans, violated insurance regulations. These are the same transactions as Beck alleges constituted "looting." Pet. Br. at 9-10.

Fourth, SIG's bankruptcy trustee filed a legal malpractice suit on behalf of SIG against Lampf Lipkind Prupis & Petigrow

(Lampf Lipkind).[5] That suit alleged that Lampf Lipkind negligently advised SIG: to enter "workout" loans with defaulting contractors, resulting in the submission of misleading financial statements to the insurance regulators and others[6]; to withdraw funds from SIG's insurance subsidiaries and to use those funds to satisfy SIG's own loan obligations; and that the monitoring fees paid by contractors to CPC were permissible under insurance regulations. These are the same transactions included as predicate acts in Beck's pleadings. J.A. 60-62, 76-83, 138-41.

SUMMARY OF ARGUMENT

A terminated employee lacks standing to assert a RICO conspiracy claim because his injury was caused by an ordinary overt act (termination of employment), not by predicate acts of racketeering. RICO's conspiracy section, 18 U.S.C. § 1962(d), cannot be read in a vacuum. When read in the context of RICO's substantive provisions, 18 U.S.C. § 1962(a)-(c), and when considered in light of the statute's central purpose of punishing racketeering activity, the conspiracy section should be read to confer standing only upon persons who have been injured by an overt act that is itself a RICO predicate act. The predicate act requirement for conspiracy standing is consistent with this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S.

5. Although that suit is outside the appellate record, it is a matter of public record. *See Jules Bagdan, in his capacity as Trustee in Bankruptcy of Southeastern Ins. Group, Inc. v. Lampf Lipkind Prupis Petigrow & LaBue, P.C.*, Case No. 93-6819 (S.D. Fla., Ft. Lauderdale Div.).

6. In some instances if a contractor defaulted on a job, resulting in a possible claim on the SIG surety bond, SIG would loan the contractor money to complete the job to avoid a default. It classified the loan (workout) as an asset (account receivable) on its financial statement rather than creating a liability or claim reserve for the default.

479 (1985), which recognized that a defendant who violates § 1962(c) is not liable for treble damages to everyone he might have injured by conduct other than predicate acts.

The majority approach gives meaning to each subsection of § 1962. The minority approach, on the other hand, effectively eviscerates § 1962(a)-(c) in a civil conspiracy case by permitting a plaintiff who lacks standing under those substantive provisions to obtain standing simply by alleging a conspiracy to commit those same substantive acts.

Beck's attempt to effect a wholesale transfer of criminal conspiracy concepts into civil RICO is inappropriate. Congress intended that in civil RICO suits, courts apply well-settled concepts of civil conspiracy law. Courts have long recognized that there is no cause of action for civil conspiracy as such, because it is the wrong resulting in damage, not the conspiracy, that constitutes the cause of action. The purpose of a "civil conspiracy" allegation is to serve as a procedural device to subject co-conspirators to "vicarious liability" if any one of them commits an actionable tort. Furthermore, in the civil context, the mere agreement to commit a tort is never itself actionable and, unlike in the criminal context, the overt act must be the very underlying tortious wrong that damaged the plaintiff and furnished the cause of action. Therefore, under RICO, a plaintiff does not have a civil conspiracy claim unless he was injured by reason of a violation of RICO's substantive racketeering provisions.

Principles of proximate causation, applied by this Court in *Holmes*, support the view that a terminated employee lacks standing to pursue a RICO conspiracy claim. The parties "proximately" injured by a RICO conspiracy are the direct victims of the racketeering activity performed pursuant to the conspiracy. Beck's loss of employment was a tangential by-

product, not a direct result, of the RICO conspiracy. The persons directly injured by the predicate acts not only had an incentive to sue but did so; they are the most effective enforcers of RICO.

The Court's antitrust precedents also support the view that standing to sue for a RICO conspiracy requires a plaintiff to show that his injury was proximately caused by a predicate act. To have standing to bring an antitrust action, a plaintiff must allege antitrust injury — i.e., "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). In antitrust law, the federal courts have almost unanimously held that an employee terminated in retaliation for refusing to participate in, or blowing the whistle on, an antitrust violation lacks standing to sue under § 4 of the Clayton Act, because they have not suffered an "antitrust injury" and because there are more direct victims of the antitrust violation who have incentive to sue. In a RICO case, it is similarly appropriate to compare the injury alleged with those injuries Congress sought to redress in making defendant's conduct unlawful and in providing a private remedy under § 1964(c). The only injuries "proximately caused" by a RICO conspiracy (whose goal is to commit racketeering activity) are those flowing from the predicate acts of racketeering that were Congress's target in enacting RICO.

Finally, concerns of federalism also support the requirement that a RICO conspiracy plaintiff be injured by an unlawful predicate act. Under the minority approach, a substantial body of state common law would be incorporated into RICO under a "conspiracy" umbrella, thus transforming RICO into a federal super-tort statute. RICO has a dangerous potential to engulf common law causes of action through an overly broad construction of the civil conspiracy doctrine. This danger approaches constitutional dimensions. To avoid a wholesale

federalization of state common law, RICO should be interpreted as requiring a conspiracy plaintiff to be injured by a substantive RICO violation.

ARGUMENT

I.

CONTRARY TO THE MINORITY VIEW, RICO'S PLAIN LANGUAGE DOES NOT CONFER STANDING UPON A TERMINATED EMPLOYEE TO SUE FOR A CONSPIRACY.

Beck's primary argument is that the "clear and unambiguous language" of § 1962(d) and § 1964(c) "algebraically" confers civil RICO standing upon any person "who has been injured by reason of a conspiracy to violate any of the provisions of subsections (a), (b), or (c)" of § 1962. Pet. Br. at 16. According to Beck, a person has standing to assert a RICO conspiracy claim even if his injury was caused by an ordinary overt act as opposed to a predicate act of racketeering. Pet. Br. at 16-21.

Beck's plain language argument, which reflects the minority view, is fundamentally flawed. First, that view is overly mechanistic and reads § 1962(d) in a vacuum, without reference to RICO's central purpose of punishing racketeering activity. Consequently, the minority view divorces RICO from its racketeering foundation and, if accepted, would eviscerate RICO's core substantive provisions in a civil action. *See infra* Point I.A. Second, Beck's argument depends upon the faulty assumption that concepts of *criminal* conspiracy law apply even though he seeks *civil* standing to sue for a federally created statutory tort. When the proper civil conspiracy principles are applied, Beck's plain-language argument collapses. *See infra* Point I.B.

A. The Minority View Would Eviscerate RICO's Substantive Provisions in a Civil Action.

Section 1964(c) authorizes a private suit for treble damages by "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Section 1962, in turn, creates three substantive offenses, all dependent upon the commission of a "pattern of racketeering activity." 18 U.S.C. § 1962(a)-(c). Section 1962(a) prohibits the use of income derived from a pattern of racketeering activity to invest in an enterprise; section 1962(b) prohibits the acquisition of an interest in or control of an enterprise through a pattern of racketeering activity; and section 1962(c) prohibits a person from conducting the affairs of an enterprise through a pattern of racketeering activity. Section 1962(d) makes it unlawful "to conspire to violate" any of the substantive provisions.[7] The predicate acts of "racketeering" that undergird all of these offenses include various felonies "chargeable" under state law and various crimes "indictable" under federal law. 18 U.S.C. § 1961(1).

In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-97 (1985), this Court rejected a rule that would have conferred standing only upon those who sustained a "racketeering injury" — an amorphous concept that required an injury caused indirectly by the entire pattern of racketeering activity.[8] Instead, the Court held that "the compensable injury [under § 1962(c)] necessarily is the harm caused by predicate acts, . . . *for the*

7. Here, the Eleventh Circuit held that Beck failed to present any evidence to support his claims under subsections (a) and (b). The court therefore "treat[ed] all of his substantive claims as 1962(c) claims." Pet. App. at 6 n.8.

8. *See Haroco, Inc. v. American Nat. Bank and Trust Co. of Chicago*, 747 F.2d 384, 387-99 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

essence of the violation is the commission of those acts in connection with the conduct of an enterprise." *Sedima*, 473 U.S. at 496-97 (emphasis added).[9]

The Court noted, however, that "[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct," i.e., by conduct other than predicate acts. *Id.* at 496-97. In the years after *Sedima*, the circuit courts have unanimously held that employment termination is the type of "other conduct" that is not compensable under RICO's *substantive* provisions. *See Bowman*, 985 F.2d at 385 (collecting cases).

The predicate act requirement for conspiracy claims is similarly consistent with the Court's repeated recognition that Congress's primary purpose in enacting RICO was to combat "long-term criminal activity." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248-49 (1989); *United States v. Turkette*, 452 U.S. 576, 588-91 (1981); *Russello v. United States*, 464 U.S. 16, 26-29 (1983). Central to that purpose was Congress's careful delineation of approximately 50 acts of "racketeering" that are the linchpin of a RICO violation, 18 U.S.C. §§ 1961(1) & 1962, and the requirement that defendants commit, or conspire to commit, a "pattern of racketeering activity," 18 U.S.C. § 1962. *See Sedima*, 473 U.S. at 481 ("RICO takes aim at 'racketeering activity' ").

By holding that a terminated employee lacks standing to sue for a RICO conspiracy because his injury is not proximately

9. Because the only substantive claim evaluated by the Eleventh Circuit was Beck's claim under § 1962(c), *see* note 7 *supra*, his § 1962(d) conspiracy claim can only be understood as alleging a conspiracy to violate § 1962(c). Accordingly, this appeal involves the appropriate standing requirements for a claim alleging a conspiracy to violate § 1962(c). There is no issue as to the appropriate standing requirements for a claim alleging a conspiracy to violate §§ 1962(a) (investment or use) or (b) (acquire or maintain).

caused by a predicate act, the courts in the majority attempt to effectuate this congressional purpose. They reason that *Sedima*'s predicate act injury requirement "applies equally well to RICO's conspiracy provisions," *Beck*, Pet. App. at 15, because "Congress did not deploy RICO as an instrument against all unlawful acts" but rather only against racketeering acts. *Hecht*, 897 F.2d at 25. They emphasize that because Congress "painstakingly" enumerated a list of predicate acts in 18 U.S.C. § 1961(1), to allow recovery of RICO damages for an injury caused by an act other than one of those predicate acts "would be tantamount to rewriting the statute." *Miranda*, 948 F.2d at 48; *accord Beck*, Pet. App. at 14-18; *Bowman*, 985 F.2d at 388; *Reddy*, 912 F.2d at 295.

Indeed, under the minority view endorsed by Beck, the predicate act standing limitation imposed by § 1962(a)-(c) could be easily circumvented by "the artful pleader." *Bowman*, 985 F.2d at 388. Instead of bringing a wrongful discharge claim in state court, the plaintiff "could circumvent the predicate act requirement applicable to suits based on § 1962(a)-(c) simply by alleging a conspiracy to commit those same substantive acts." *Id.*; *accord Beck*, Pet. App. at 16-17.[10]

Thus, the minority view turns RICO on its head, with the conspiracy provision eviscerating the three substantive provisions that inform it. As this Court recognized long ago, "every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every

10. The minority view, of course, would not render § 1962(a)-(c) superfluous if the plaintiff was injured by a single defendant's RICO violation; such a plaintiff could sue only under § 1962(a)-(c) and would not be able to avoid the predicate act requirement. But such cases are rare. In the typical civil RICO case, the alleged pattern of racketeering activity is committed by more than one person.

clause and provision shall avail, and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another." *Peck v. Jenness*, 48 U.S. (7 How.) 612, 623 (1849). Thus, the Court should be "hesitant to adopt" a statutory interpretation that would render § 1962(a)-(c) "superfluous." *See Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998).

Even if Beck's interpretation is suggested by a literal reading of RICO — a doubtful proposition in any event, *see infra* Point I.C. — that does not end the inquiry. It is a well-established canon of statutory construction that "absurd results" should be avoided, *United States v. Turkette*, 452 U.S. 576, 580 (1981); and if reliance on a statute's literal language would "defeat the plain purpose of the statute," a court should go beyond the literal language and follow the statute's purpose. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983); *see also United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 242 (1989); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965).

Indeed, in *Holmes v. Securities Inv. Protection Corp.*, 503 U.S. 258, 267 (1992), the Court eschewed a literal reading of § 1964(c), which appeared to require merely "but for" causation, in favor of a more informed reading, which dictated "proximate" causation. The Court did so because of "the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover." *Id.* at 266; *see also Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59-60 (1911) (rejecting literal interpretation of § 1 of Sherman Act and holding that only "unreasonable" restraints of trade are prohibited).

Similarly, it is unlikely that Congress intended to foreclose substantive standing under § 1962(a)-(c) for injuries caused by ordinary acts while simultaneously conferring conspiracy

standing under § 1962(d) for injuries caused by those same ordinary acts. This is reason enough to reject Beck's purportedly "literal" interpretation of RICO.

Adoption of the minority view would expand standing beyond terminated whistleblowing employees to virtually anyone who threatens to report, or actually does report, allegedly illegal activities to law enforcement or other authorities — a result Congress did not likely intend. For example, if a non-employee learns of illegal conduct and threatens to or actually does disclose it, leading to a campaign of defamation to discredit him — with consequent harm to that person's business or ability to earn a living — the minority view's mechanistic interpretation of § 1962(d) would provide RICO standing for what should be a common law defamation suit. That would result in an overly broad application of the conspiracy provision.

B. The Majority View Does Not Render § 1962(d) Superfluous in a Civil Action.

Beck asserts that the majority's "predicate act" requirement renders § 1962(d) superfluous in a civil action because RICO plaintiffs can already sue under § 1962(a)-(c) for injuries caused by predicate acts. Pet. Br. at 19-21. He is wrong; under the majority view, § 1962(d) still serves an important, independent function. As is explained in detail below, the RICO conspiracy section serves as a procedural device to impose vicarious civil liability upon all co-conspirators for the predicate acts committed by the others.

Thus, unlike the minority approach, which would eviscerate RICO's core substantive provisions, the majority approach gives meaning and effect to each subsection of § 1962.[11]

11. *See Bailey v. United States*, 516 U.S. 137, 145 (1995) (interpretation of statutory phrases depends on their "placement and

(Cont'd)

C. Common Law Concepts of Civil Conspiracy, Which Congress Incorporated Into RICO, Preclude Standing Unless the Plaintiff's Injury Was Caused by an Unlawful Overt Act.

Beck purports to base his plain-language theory on "traditional concepts of conspiracy law." Pet. Br. at 21-26. But all of the "traditional concepts" upon which Beck relies are *criminal* ones, even though he seeks standing to pursue a *civil* RICO claim. This commingling of criminal and civil concepts produces a distorted interpretation of RICO, inconsistent with the well-settled principles of civil conspiracy that Congress intended the courts to apply in civil RICO suits.

1. Civil Concepts of Conspiracy Law Apply in a Civil RICO Action.

The term "conspiracy" is not defined in RICO. *See* 18 U.S.C. § 1961. At the time of RICO's enactment, however, that term had a settled common law meaning when applied in the civil context. "[W]here Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Neder v. United States*, __ U.S. __, 119 S. Ct. 1827, 1840 (1999) (citations omitted). Thus, when Congress used the term "conspiracy" in the context of a civil RICO claim, it presumably intended to incorporate the settled civil law meaning of that term. *See Kolstad v. American Dental Ass'n*, __ U.S.

(Cont'd)
purpose in the statutory scheme" and on their "context"); *see also United States v. Gordon*, 961 F.2d 426, 431 (3rd Cir. 1992) ("Courts should attempt to reconcile two seemingly conflicting statutory provisions whenever possible, instead of allowing one provision effectively to nullify the other provision").

__, 119 S. Ct. 2118, 2125, 2126-27 (1999) (applying common law principles in interpreting phrase "punitive damages" under Civil Rights Act of 1991); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59-60 (1911) (applying common law understandings of phrase "restraint of trade" in interpreting section 1 of the Sherman Act).

Contrary to Beck's assertions (Pet. Br. at 24-26), the use of criminal conspiracy concepts in a civil RICO action is not required by *Salinas v. United States*, 522 U.S. 52 (1997). There, the Court interpreted the term "conspiracy" in the context of a *criminal* RICO case. In a civil RICO case, however, it only makes sense to apply civil conspiracy law. *See Beck*, Pet. App. 16-17 & n.18 (applying civil conspiracy law and distinguishing *Salinas* because it involved criminal RICO).[12]

There is nothing unusual about interpreting the RICO "conspiracy" language in distinct ways, depending upon the

12. Beck asserts that the lower courts have "repeatedly" applied *Salinas* in civil proceedings. Pet. Br. at 26. This assertion is incorrect and misleading. In fact, at least three courts, including the Eleventh Circuit below, have held that *Salinas* does not apply in determining civil RICO standing. *See Beck*, Pet. App. at 16-17 & n.18; *Kaplan v. Reed*, 28 F. Supp. 2d 1191, 1197-98 (D. Colo. 1998); *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 353 (S.D.N.Y. 1998). Moreover, in the cases Beck cites, the courts applied *Salinas* not on the civil conspiracy standing issue but on the issue of whether the plaintiff proved the "agreement" element of conspiracy, an issue that is approached in the same way under civil and criminal law. *See Goren v. New Vision Intern., Inc.*, 156 F.3d 721, 731-32 (7th Cir. 1998); *BCCI Holdings (Luxembourg, S.A. v. Khalil*, __ F. Supp. 2d __, 1999 WL 432560, *36 (D.D.C. June 23, 1999); *Nystrom v. Associated Plastic Fabricators, Inc.*, 1999 WL 417848, *7 (N.D. Ill. June 18, 1999); *Florida Software Systems, Inc. v. Columbia/HCA Healthcare Corp.*, 46 F. Supp. 2d 1276, 1283-84 (M.D. Fla. 1999) (also discussing civil RICO standing in dictum); *Southern Intermodal Logistics v. D.J. Powers Co.*, 10 F. Supp. 2d 1337, 1360-61 (S.D. Ga. 1998).

nature of the action. Varied meanings are suggested by RICO's provision for criminal and civil liability for the same misconduct. 18 U.S.C. §§ 1962-1964; *see also Sedima*, 473 U.S. at 492 (noting RICO's dual purpose); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188 (1997) ("there are significant differences between civil and criminal RICO actions"). Indeed, the Court has applied different standards depending upon the civil or criminal nature of the RICO case. *See Sedima*, 473 U.S. at 490-91 (suggesting that "preponderance of the evidence" standard should apply in civil RICO actions, even though "beyond a reasonable doubt" standard applies in criminal RICO actions, and even though RICO's predicate acts are all "indictable" or "chargeable" crimes); *Agency Holding Corp. v. Malley-Duff Assocs., Inc.*, 483 U.S. 143, 155-56 (1987) (holding that civil RICO actions are subject to four-year limitation period, even though criminal RICO prosecutions are subject to five-year limitation period); *Klehr*, 522 U.S. at 187-88 (rejecting "last predicate act" rule for accrual of civil RICO statute of limitations, even though RICO's criminal statute of limitations runs from last predicate act); *see also United States v. Gypsum Co.*, 438 U.S. 422, 435 n.13 (1978).

It is immaterial that other RICO terms — such as "conduct," "enterprise" and "pattern of racketeering activity" — are given consistent meaning in both criminal and civil RICO actions. *See Reves v. Ernst & Young*, 507 U.S. 170, 177-83 (1993); *Turkette*, 452 U.S. at 580-81; *H.J., Inc.*, 492 U.S. at 236-43. Quite simply, none of those terms had any established meaning at common law, *see Agency Holding*, 483 U.S. at 149-50, and "enterprise" and "pattern of racketeering activity" are explicitly defined in RICO. 18 U.S.C. § 1961(4) and (5). Therefore, those terms are properly given the same meaning in criminal and civil RICO actions.

The term "conspiracy," on the other hand, is not defined in RICO and had two separate and drastically different meanings at common law. *See infra* at 23-27. Therefore, the only reasonable conclusion is that Congress intended the term "conspiracy" to be given its appropriate common law meaning depending on whether the action was criminal or civil.

2. Civil Conspiracy Is a Procedural Mechanism to Impute Liability Among Co-Conspirators, Not an Independent Substantive Cause of Action.

Under the minority view, RICO would provide an independent cause of action for civil "conspiracy" even when the underlying substantive claims are not actionable. In advocating this theory, Beck relies exclusively upon *criminal* concepts of conspiracy. He argues that: (1) "the gist of a conspiracy is the agreement itself"; (2) a conspiracy is punishable even if "no substantive crime [is] committed"; (3) the overt act in furtherance of the conspiracy did not, at common law, have to be unlawful; and (4) an overt act is not required in criminal RICO prosecutions. Pet. Br. at 23-25.

Beck attempts to effect a wholesale transfer of these criminal concepts into the civil RICO arena, arguing that the injury-causing overt act in a civil RICO case need not be an unlawful predicate act. Pet. Br. at 24. He even insists that there is no basis for any distinction between criminal and civil conspiracies, claiming that both "serve to impute liability" and that, like criminal conspiracies, "the gist of civil conspiracies is the agreement itself, as well, while adding the requirement of an injury." Pet. Br. at 25-26 (citations omitted). Beck's fusion of criminal and civil conspiracy concepts is inappropriate. A comparison of criminal and civil conspiracy law shows that, while Beck's "ordinary overt act" approach makes sense in the criminal context, it is antithetical to common law concepts of "civil conspiracy" that Congress incorporated into RICO.

First, whereas in criminal law the mere *agreement* to commit an unlawful act is the gist of the crime, *Braverman v. United States*, 317 U.S. 49, 53 (1942), in the civil context "[t]he gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff." William Prosser, *The Law of Torts* § 46, at 293 (4th ed. 1971) (hereinafter *Prosser*). Indeed, as this Court stated more than a century ago, a civil conspiracy claim "cannot be sustained [merely] because there has been a conspiracy" but rather requires plaintiff to show that "the defendants have done some wrong, that is, have violated some right of [plaintiffs], and that damage has resulted." *Adler v. Fenton*, 65 U.S. (24 How.) 407, 410 (1860). Thus, it is typically stated that "there is no cause of action for conspiracy as such," because "it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action."[13] The purpose of a "civil conspiracy" allegation is to serve as a procedural device for subjecting co-conspirators to "vicarious liability" if any one of them commits an actionable tort. *Prosser* § 46, at 291-92.[14] By 1970, when RICO was enacted, these principles were firmly embedded in the common law.

Second, whereas in criminal law the conspiracy and the underlying crime are two separate punishable offenses, *Callanan*

13. *Indianapolis Horse Patrol, Inc. v. Ward*, 217 N.E.2d 626, 628 (Ind. 1966); *Mox v. Woods*, 262 P. 302, 303 (Cal. 1927); *see also Becker v. Thompson*, 76 S.W.2d 357, 361 (Mo. 1934); *Brackett v. Griswold*, 20 N.E. 376 (N.Y. 1889); *Shope v. Boyer*, 150 S.E.2d 771, 774 (N.C. 1966).

14. *Accord* 4 *Restatement (Second) of Torts*, § 876(a) & comment b (1979); Thomas M. Cooley, *The Law of Torts*, Ch. V. at 125 (1880); *see Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983); *Beck*, Pet. App. at 16-17 n.18 ("In a civil context, . . . the purpose of a conspiracy claim is to impute liability — to make X jointly liable with D for what D did to P").

v. United States, 364 U.S. 587, 593 (1961), in the civil context the mere agreement to commit a tort is never itself actionable. "The mere common plan, design or even express agreement is not enough for liability in itself, and there must be acts of a tortious character in carrying it into execution." 4 *Restatement (Second) of Torts*, § 876 comment b, at 316 (1979).[15] As this Court has recognized, there can be no civil liability for conspiracy unless one of the conspirators commits an underlying tort. *Nalle v. Oyster*, 230 U.S. 165, 182-83 (1913) (because underlying libel claim was "not actionable, it follows plainly enough that a conspiracy to [commit libel] is not actionable").

Third, there is a fundamental difference between the function of the "overt act" in criminal and civil conspiracy law. "The function of the overt act in a conspiracy prosecution is simply to manifest 'that the conspiracy is at work,' " — i.e., to corroborate, through circumstantial evidence, the existence of the unlawful agreement. *Yates v. United States*, 354 U.S. 298, 333-34 (1957) (citations omitted); *Braverman*, 317 U.S. at 53.[16] As a result, the overt act need not "constitute the very crime that is the object of the conspiracy" and need not even be unlawful. *United States v. Rabinowich*, 238 U.S. 78, 86 (1915). Rather, it can be any ordinary act that tends to further the conspiracy. *See Yates*, 354 U.S. at 333-34 (stating that speech at public meeting could be considered overt act).

In the civil context, however, the overt act must be the very underlying tortious wrong that damaged the plaintiff and furnished the cause of action. *See Adler* 65 U.S. (24 How.) at 410 ("An act legal in itself, and violating no right, cannot be

15. *See also Cooley* Ch. V. at 125; *Prosser* § 46, at 293.

16. In criminal law, an overt act serves other procedural functions as well, relating to venue and accrual of the statute of limitations.

made actionable on account of" a conspiracy). If the "overt" act in a civil case does not constitute a substantive wrong, there is no cause of action for the conspiracy. *Nalle*, 230 U.S. at 182-83.[17]

Finally, the fact that an overt act need not be committed to sustain a *criminal* RICO conviction, *Salinas*, 522 U.S. at 63, is irrelevant. As all recognize — including the minority circuits — some overt act is necessary under civil RICO because otherwise there would be no "injury to business or property" as required by § 1964(c). *See, e.g.*, *Schiffels*, 978 F.2d at 348-49; *Medallion TV Enterprises v. SelecTV of Cal., Inc.*, 627 F. Supp. 1290, 1298 (C.D. Cal. 1986), *aff'd*, 833 F.2d 1360 (9th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989); *see also Klehr*, 521 U.S. at 189.

Indeed, as in RICO, no overt act is required to sustain a criminal conviction under the antitrust laws. *See United States v. Saucony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); *Nash v. United States*, 229 U.S. 373, 378 (1913). Yet a civil antitrust action requires an injury caused by reason of an *unlawful* overt act. It is not enough that two people conspire to restrain trade and that plaintiff be injured by some ordinary act; the injury must be caused by an act that constitutes the substantive violation of the antitrust laws. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971), *citing Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd.*, 185 F.2d 196, 207-08 (9th Cir. 1950).[18]

17. *See also Prosser* § 46, at 293; *Restatement* § 876(a) & comments b and c; *Cooley* Ch. V at 125-26.

18. In *Zenith*, this Court held that any overt act within the four-year limitations period that effectuates an antitrust injury pursuant to the conspiracy gives rise to an action for damages. 401 U.S. at 338-42. Conversely, overt acts that do not effectuate an antitrust injury do not give rise to an action for damages. For instance, in *Suckow* — cited with approval in *Zenith* — the court concluded that defendant's purchase of certain business interests and procurement of releases did not constitute "illegal overt acts . . . to the damage of [plaintiffs]"; thus, such acts were not antitrust violations and did not constitute part of a "continuing violation" for statute of limitations purposes. *Suckow*, 185 F.2d at 207-09. Similarly, in *Kaiser Alum. & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1055-56 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), the court held that plaintiff's antitrust action was time-barred even though plaintiff had identified four overt acts occurring within the limitations period; although those acts "may have resulted in pecuniary injury" to plaintiff, "they [did] not, however, constitute acts injurious to plaintiff as antitrust damage."

(Cont'd)

In sum, Beck's attempt to synthesize criminal and civil conspiracy law fails completely. Any similarities between criminal and civil conspiracies are overshadowed by their fundamental differences.

3. Civil Concepts of Conspiracy Require That a Plaintiff's Injury Be Caused by an Underlying Substantive RICO Violation.

Beck argues that it would be a "radical change" to require "the actual commission of a predicate act, i.e., the underlying substantive crime, to establish civil liability for a RICO conspiracy." Pet. Br. at 25. On the contrary, as the Eleventh Circuit recognized, settled concepts of civil conspiracy law require that very result: "[A] civil conspiracy plaintiff must prove that someone in the conspiracy committed a tortious act

In *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), this Court rejected the "last predicate act rule" for accrual of RICO's four-year statute of limitations. The Court analogized to antitrust precedent in noting that "'each overt act *that is part of the violation and that injures the plaintiff*, . . . starts the statutory period running again.' " *Id.* at 189, *quoting* 2 Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 338b, at 145 (rev. ed. 1995) and *citing Zenith* (emphasis added).

that proximately caused his injury; the plaintiff can then hold other members of the conspiracy liable for that injury." *Beck*, Pet. App. at 16-17 & n.18.

Because Beck lacked standing to pursue his substantive RICO claims under § 1962(a)-(c), he should not have standing to pursue a RICO conspiracy claim under § 1962(d) based on the same conduct and the same alleged injuries. In the parlance of the common law, the act that injured Beck — termination of employment — is not unlawful under substantive RICO and thus lacks the "tortious" quality that a civil conspiracy claim demands as a condition of recovery. To provide Beck with standing to assert a conspiracy claim when he lacks standing to assert a substantive claim would be tantamount to creating an independent tort of conspiracy, which the courts have long rejected. *See, e.g.*, *Adler*, 65 U.S. (24 How.) at 410; *Nalle*, 230 U.S. at 182-83.

One might argue that because Beck's termination was allegedly "wrongful" in the contemporary sense of the word, it constituted an underlying tort sufficient to sustain a conspiracy claim. This argument does not withstand analysis. Beck is not suing for any ordinary civil conspiracy, for which he could recover for an ordinary common law tort; he is seeking standing *under RICO* to recover for a federally created *statutory* tort, for an injury purportedly flowing from a conspiracy *to violate RICO's substantive provisions*. Therefore, the underlying wrongful act that creates a RICO conspiracy claim must be unlawful in the *statutory* sense.

Indeed, in contexts other than employment termination, the circuit courts have held that if the substantive RICO claims are deficient, dismissal of a RICO conspiracy claim necessarily follows. Thus, if the plaintiff lacks standing to assert substantive

RICO claims, he also lacks standing to assert a RICO conspiracy claim.[19]

In sum, because Beck cannot prove that he was injured by a substantive RICO offense prohibited by § 1962(a)-(c), he should not have conspiracy standing under § 1962(d) even though he was allegedly injured by a common law tort committed during the course of the alleged RICO conspiracy. The "unlawful" overt act that creates a cause of action for a RICO conspiracy must be a *statutory* unlawful act — i.e., a predicate act of racketeering listed in § 1961(1).

II.

A PERSON WHOSE INJURY WAS NOT CAUSED BY A PREDICATE ACT DOES NOT SATISFY THE PROXIMATE CAUSE STANDARDS IDENTIFIED IN *HOLMES*.

Principles of proximate causation support the view that a terminated employee lacks standing to pursue a RICO conspiracy claim. The parties "proximately" injured by a RICO

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19. *See Danielson v. Burnside-Ott Aviation*, 941 F.2d 1220, 1232 (D.C. Cir. 1991) (holding that because plaintiff lacked standing to assert substantive claims under § 1962(a)-(c), he also lacked standing to assert conspiracy claim under § 1962(d)); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1150-51 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989) (holding that because plaintiff lacked standing to assert substantive claim under § 1962(a), he also lacked standing to assert a conspiracy claim under § 1962(d)); *see also Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1191 (3rd Cir. 1993); *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998); *Religious Tech. Center v. Wollersheim*, 971 F.2d 364, 367 n.8 (9th Cir. 1992); *Edwards v. First Nat. Bank of Bartlesville*, 872 F.2d 347, 352 (10th Cir. 1989).

conspiracy are the direct victims of the racketeering activity performed pursuant to the conspiracy. Beck's loss of employment was a tangential by-product, not a direct result, of the RICO conspiracy.

A. As a Terminated Employee, Beck Is Merely an Indirect Victim of the RICO Violation And Is Not the Most Efficient Enforcer of the Statute.

Section 1964(c) was modeled on section 4 of the Clayton Act, which confers civil standing upon "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15; *see Holmes*, 503 U.S. at 267; *Sedima*, 473 U.S. at 489-90 & n.8. Because of the "close similarity" in "purpose and structure" of RICO and the Clayton Act, *Agency Holding*, 483 U.S. at 150-52, their civil standing requirements should be interpreted consistently. *See Holmes*, 503 U.S. at 268.

As is the case under section 4 of the Clayton Act, § 1964(c) requires a plaintiff to show that the defendants' RICO violation was both a "but for" cause and a "proximate" cause of his injury. *Holmes*, 503 U.S. at 265-69. As this Court has noted, "proximate cause" is not a static concept but rather is a generic "label" for the set of "judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Id.* at 268. "At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.' " *Id.* at 268 (citation omitted).

In the context of both RICO and antitrust, the tendency in regard to damages "is not to go beyond the first step." *Holmes*, 503 U.S. at 271; *Associated Gen. Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519, 534 (1983). Thus, the proximate cause rule demands "some direct

relation between the injury asserted and the injurious conduct alleged" and precludes recovery by a plaintiff who complains of harm "flowing merely from the misfortunes visited upon a third person by the defendant's acts." *Holmes*, 503 U.S. at 268.

Drawing upon its antitrust precedents, this Court in *Holmes* held that an indirectly injured plaintiff lacked standing to sue under RICO because "the link [was] too remote" between the alleged racketeering activity and the harm sustained by plaintiff. *Holmes*, 503 U.S. at 271. The Court identified three principles to aid in determining whether a plaintiff has RICO standing: (a) the less direct an injury, the more difficult it is to ascertain the amount of plaintiff's damages attributable to the violation as distinct from other independent factors (factual causation); (b) claims of indirectly injured persons would force courts to adopt complicated rules apportioning damages among various plaintiffs to eliminate the risk of multiple recoveries; and (c) to avoid the need to grapple with these potentially complex problems, a court should inquire whether there are more directly injured victims who can be counted upon to vindicate the law as private attorneys general without the problems attendant to suits by plaintiffs more remotely injured. *Holmes*, 503 U.S. at 268.[20]

Here, Beck's alleged RICO injury was indirect. The RICO "conspiracy" was an alleged agreement to violate RICO's substantive provisions by committing mail fraud, wire fraud

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20. Even though the plaintiff in *Holmes* was in the linear chain of causation because his injuries resulted from the commission of the predicate acts, this Court nevertheless held that it was too far down that chain to allow standing, i.e., it was difficult to determine if its injuries resulted from the RICO acts or from other factors. *Holmes*, 503 U.S. at 272. Beck's injuries are even more remote and are not even in the linear chain of harm resulting from the predicate acts.

and extortion. Thus, the "direct" victims of the conspiracy were the contractors who paid improper monitoring fees; First Fidelity, which was induced to loan SIG $7.5 million; and SIG and its insurance subsidiaries, whose treasuries were supposedly looted. Beck was not an object of this conspiracy, and his loss of employment stemmed not from mail fraud, wire fraud or extortion but from SIG's collateral decision to fire him. Therefore, his injury is a mere "byproduct" of the alleged RICO conspiracy.[21]

If saddled with all of the baggage of a RICO claim, a trial of Beck's wrongful discharge case would not be "administratively . . . convenient," *see Holmes*, 503 U.S. at 268, especially because the direct victims are better able to vindicate RICO's purpose. Beck would have to prove all the elements of a RICO claim, including the existence of an enterprise, the existence of a conspiracy and a pattern of racketeering activity — an endeavor that would require the district court to supervise extensive, protracted discovery concerning the SIG defendants' business practices and motives spanning several years. On top of that, there would be a sharp factual dispute as to the reason for Beck's termination. Was it caused by the SIG defendants' desire to deprive him of the stock repurchase provided by his employment contract? By their desire to remove SIG's entire management team for poor performance, as recommended by Firemark? Or by their desire to punish him for blowing the whistle?

A much simpler and more administratively convenient cause of action, capable of yielding the same actual damages — plus the possibility of punitive damages — would be a state

21. *See Fallis v. Pendleton Woolen Mills, Inc.*, 866 F.2d 209, 211 (6th Cir. 1989) (holding that terminated whistleblower lacked antitrust standing); *accord In re Industrial Gas Antitrust Litig. (Bichan v. Chemetron Corp.)*, 681 F.2d 514, 520 (7th Cir. 1982) (same).

court suit for wrongful discharge.[22] In such a suit, the terminated employee would not have to prove the characteristics of the "enterprise" or the existence of a conspiracy or a pattern of racketeering activity, and the extent and scope of the discovery and trial would be correspondingly simpler. The plaintiff would merely have to prove that he was fired in retaliation for complaining about a single criminal act, rather than about a pattern of racketeering activity connected with a RICO "conspiracy" and "enterprise."[23]

In a RICO suit, there is no reason why a federal court and jury should have to grapple with factual disputes regarding an employer's motivation in terminating an employee, given "the fact that those directly injured . . . [can] be counted on to bring suit for the law's vindication" without the attendant factual disputes. *See Holmes*, 503 U.S. at 269, 273. Indeed, the direct victims of the SIG defendants' alleged RICO violation had incentive to sue and, with the exception of the contractors, did sue. SIG's bankruptcy trustee filed a RICO suit against the SIG defendants based upon the same conduct alleged in Beck's complaint. (*cf. Holmes*, 503 U.S. at 272, where this Court noted that the insolvency trustee for the broker dealers had filed suit).

22. The overwhelming majority of states have recognized either a common law or a statutory cause of action for wrongful discharge. *See Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 106 nn.2-4 (Colo. 1992) (collecting common law holdings of other state courts); 9A Labor Relations Reporter — Individual Employment Rights Manual (BNA) at 505:28, 540-592 (1999) (collecting state whistleblower statutes). Indeed, Beck sued SIG and the SIG defendants in state court asserting a variety of claims and seeking damages flowing from his termination. R-5-138-Exh.E.

23. *See Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 751 (9th Cir. 1984), *cert. dism'd*, 469 U.S. 1200 (1985) (Kennedy, J., dissenting) ("In its zeal to compensate Ostrofe for his injury, the majority has given Ostrofe the wrong cause of action. He should be seeking remedies for wrongful discharge, not treble damages for a violation of the antitrust laws").

First Fidelity filed an action based on SIG's failure to repay a portion of the $7.5 million loan. SIG's trustee filed an action against SIG's former attorneys alleging legal malpractice that caused SIG to engage in the predicate acts. And both the Florida and New Jersey insurance departments filed actions on behalf of SIG's subsidiaries against the SIG defendants for the same alleged looting set forth in Beck's complaint. Although these latter suits were not brought under RICO, they still "vindicate the law's 'general interest in deterring injurious conduct.' " *Callahan v. A.E.V., Inc.*, 182 F.3d 237, 266-67 (3d Cir. 1999) (Becker, J.) *quoting Holmes*, 503 U.S. at 269.

Finally, as with antitrust law, the most "efficient enforcers" of RICO are not whistleblowers but rather the direct victims of the RICO conspiracy. *See In re Industrial Gas Antitrust Litig. (Bichan v. Chemetron Corp.)*, 681 F.2d 514, 520 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983), *citing Illinois Brick Co. v. State of Illinois*, 431 U.S. 720, 734-35 (1977). If an indirectly injured plaintiff were permitted to sue under RICO, the defendants would be subjected to multiple treble damage awards — those in favor of the direct victim(s) of the racketeering activity and those in favor of persons injured by ordinary overt acts. Such multiple awards "reduce the immediate victim's award, thereby reducing their incentive to enforce [the RICO statute]." *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 364d at 231 (rev. ed. 1995) (hereinafter *Areeda*).[24]

24. *See also Willis v. Lipton*, 947 F.2d 998, 1002 (1st Cir. 1991) (allowing RICO suit by derivatively injured employee would deplete funds available to pay direct victims of defendant's fraudulent RICO activity); *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 30-31 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 934 (1988) (indirectly injured employees lacked antitrust standing in part because of risk of "multiple liability" against defendant's "single quantity of wealth"); *Gregory Marketing Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 97-98 (3rd Cir. 1986), *cert. denied*, 479 U.S. 821 (1986) (similar).

By allowing parties other than those directly injured by predicate acts to obtain treble damages, the minority approach would undermine RICO's remedial purposes through overdeterrence. As this Court has stated, "RICO's remedial purposes would more probably be hobbled than helped by . . . [a]llowing suits by those injured only indirectly." *Holmes*, 503 U.S. at 274. Suits by tangentially injured parties such as Beck "would open the door to massive and complex damages litigation, which would not only burden the courts, but would also undermine the effectiveness of treble damages suits." *See id.* RICO's deterrent purpose is best served by "concentrating the entire right to recover in the hands of the directly injured party." *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985) (Easterbrook, J.), *citing Illinois Brick*, 431 U.S. at 735-37; *see also Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 188 (1994) (Although aiding and abetting claim under SEC Rule 10b-5 "makes the civil remedy more far-reaching, . . . it does not follow that the objectives of the statute are better served. Secondary liability for aiders and abettors exacts costs that may disserve the goals of fair dealing and efficiency in the securities markets").

B. The Majority Approach Is Supported by Antitrust Standing Principles.

This Court's antitrust precedents support the view that standing to sue for a RICO conspiracy requires a plaintiff to show that his injury was proximately caused by a predicate act.

One element of the antitrust standing calculus is the requirement that the plaintiff show an "antitrust injury," namely, an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). An antitrust court analyzes "the relationship of the injury alleged with those forms of injury

about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy" under the Clayton Act. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478 (1982). Because antitrust law is primarily concerned with competition, a recoverable antitrust injury is one that results from an "anticompetitive aspect" of defendant's conduct. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 339 (1990); *Brunswick Corp.*, 429 U.S. at 487-89; *Associated Gen. Contractors*, 459 U.S. at 538. "This test forces antitrust courts to connect the alleged injury to the purposes of the antitrust laws." *Areeda* ¶ 362a, at 210.

In a RICO case, it is similarly appropriate to compare the "injury alleged" with those injuries Congress sought to redress "in making defendant's conduct unlawful and in providing a private remedy" under § 1964(c). *See Blue Shield*, 457 U.S. at 478. As shown in Point I, Congress was concerned with punishing racketeering activity and with remedying injuries flowing from that activity. Therefore, the only injuries "proximately caused" by a RICO conspiracy (whose goal is to commit racketeering activity) are those flowing from predicate acts of racketeering. *Cf. Holmes*, 503 U.S. at 286-90 (Scalia, J., concurring in the judgment). Anyone who suffers an injury flowing from other ordinary acts committed during the course of the conspiracy "stand[s] at too remote a distance to recover." *Holmes*, 503 U.S. at 268-69.[25]

25. Although this Court has stated that the "antitrust injury" concept has no analogue in RICO, *Holmes*, 503 U.S. at 269 n.15 (citing *Sedima*), the Court was merely referring to *Sedima*'s rejection of the amorphous "racketeering" or "competitive" injury requirements for RICO standing that some courts had borrowed from the Clayton Act. *See, e.g., Haroco*, 747 F.2d at 391-98. Here, Respondents do not seek to resurrect the "racketeering" or "competitive" injury requirements; they merely seek to apply the predicate act rule — which is derived from RICO's text — in conspiracy cases.

In antitrust law, the federal courts have grappled with a standing issue nearly identical to the one presented here: whether an employee terminated in retaliation for refusing to participate in, or blowing the whistle on, an antitrust violation has standing to sue under § 4 of the Clayton Act. With one notable but limited exception, the courts agree that such plaintiffs lack antitrust standing because they have not suffered an "antitrust injury" and because there are more direct victims of the antitrust violation who have incentive to sue.[26]

Only the Ninth Circuit would grant antitrust standing to terminated employees. *See Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982) ("*Ostrofe I*"), *cert. granted and judgment vacated*, 460 U.S. 1007 (1983), *adhered to*, 740 F.2d 739 (9th Cir. 1984) ("*Ostrofe II*"), *cert. dism'd*, 469 U.S. 1200 (1985). However, since that decision, the Ninth Circuit has strictly limited antitrust standing to cases in which a "dismissed employee is an 'essential participant' in an antitrust scheme, the dismissal is a 'necessary means' to accomplish the scheme, and the employee has the greatest incentive to challenge the antitrust violation." *Vinci v. Waste Management, Inc.*, 80 F.3d 1372, 1376-77 (9th Cir. 1996), *cert. denied*, 520 U.S. 1119 (1997). The court stated that *Ostrofe* was a "limited exception to the general rule that a terminated employee lacks antitrust standing." *Id.* at 1376-77.

26. *See In re Industrial Gas Antitrust Litig. (Bichan v. Chemetron Corp.)*, 681 F.2d 514, 517-19 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983); *Gregory Marketing Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 95-97 (3rd Cir. 1986), *cert. denied*, 479 U.S. 821 (1986); *Feeney v. Chamberlain Mfg. Corp.*, 831 F.2d 93, 96 (5th Cir. 1987); *Fallis v. Pendleton Woolen Mills, Inc.*, 866 F.2d 209, 211 (6th Cir. 1989); *Winther v. DEC Intern., Inc.*, 625 F. Supp. 100, 102-03 (D. Colo. 1985); *Thomason v. Mitsubishi Elec. Sales America, Inc.*, 701 F. Supp. 1563, 1569-70 (N.D. Ga. 1988).

The reasons for denying antitrust standing to a terminated employee are soundly based on the types of injuries the antitrust laws were intended to prevent. As noted by then-Judge Kennedy in a stinging dissent in *Ostrofe II*, a terminated employee simply does not suffer an antitrust injury — i.e., he "does not allege an injury related to an antitrust violation," and "the measure of damages does not reflect or respond to the breakdown in competition caused by the antitrust violation." *Ostrofe II*, 740 F.2d at 750 (Kennedy, J., dissenting); *accord* Areeda ¶ 377d5, at 316-17 (employees lack standing because they do not suffer injury that flows from reduced competition in product market).

Just as an employee lacks standing to claim that his termination was proximately caused by a price-fixing conspiracy aimed at a product market, an employee should lack standing to claim that his termination was proximately caused by a RICO conspiracy aimed at third parties. While in some sense both the antitrust employee and the RICO employee are *factually* injured by reason of the conspiracy, they are not "proximately" injured in a way that the respective statutes were intended to prevent. *See Ostrofe II*, 740 F.2d at 751 (Kennedy, J., dissenting) ("Antitrust enforcement becomes divorced from antitrust policy when treble damages bear no relation to the anticompetitive effects of the illegal conduct"); *Bichan*, 681 F.2d at 519 (adopting Judge Kennedy's dissent).

III.

THE MINORITY'S "ORDINARY OVERT ACT" APPROACH IMPROPERLY FEDERALIZES STATE COMMON LAW.

Concerns of federalism also support the requirement that a RICO plaintiff be injured by an unlawful predicate act. Under the minority approach, a substantial body of state common law would be incorporated into RICO under a "conspiracy"

umbrella, thus transforming RICO into a federal super-tort statute. Although Congress did anticipate *some* federalization of state fraud law, primarily through mail, wire and securities fraud predicates,[27] Congress did not intend to effect a wholesale federalization of state common law.[28] These concerns bear special significance here because the employer-employee relationship has traditionally been within the province of state law.

In an analogous context, this Court declined to construe the civil rights conspiracy statute in a way that would federalize state tort law. 42 U.S.C. § 1985(3). Recognizing the danger that § 1985(3) might be used against ordinary criminal assaults, the Court limited it, in accordance with Congress's core concern, to conspiracies having "some racial, or perhaps otherwise class-based animus." *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971). "The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose — by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation" stressed by the statute's sponsors. *Id.* at 102.

This Court reiterated these concerns more recently in holding that § 1985(3) does not provide a federal cause of action against persons obstructing access to abortion clinics. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993). The Court refused to interpret the term "class" so broadly as to allow "innumerable tort plaintiffs . . . to assert causes of action under § 1985(3) by simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered

27. *See Sedima*, 473 U.S. at 500; *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982), *cert. denied*, 464 U.S. 1008 (1983).

28. *Willis v. Lipton*, 947 F.2d 998, 1001 (1st Cir. 1991); *Miranda*, 948 F.2d at 49 (RICO "cannot be used as a surrogate for local law").

with." *Id.* at 269. Such a "definitional ploy would convert the statute into the 'general federal tort law' it was the very purpose of the [discriminatory] animus requirement to avoid." *Id.* Furthermore, the expansion of § 1985(3) was unnecessary because "[t]respassing on private property" during an abortion protest "may be prosecuted criminally under state law and may also be the basis for state civil damages." *Id.* at 286.

As with § 1985(3), RICO has a dangerous potential to engulf common law causes of action — such as wrongful discharge,[29] breach of contract or defamation — through an overly broad construction of the civil conspiracy doctrine. This danger approaches constitutional dimensions. As Justice Kennedy has observed, "essential considerations of federalism are at stake here. The federal balance is a fragile one, and a false step in interpreting § 1985(3) risks making a whole catalog of state crimes a concurrent violation of a single congressional statute." *Bray*, 506 U.S. at 287 (Kennedy, J., concurring); *cf. Gregory v. Ashcroft*, 501 U.S. 452, 460-67 (1991) (absent "plain statement" of congressional intent "to alter the usual constitutional balance between the States and the Federal Government," federal court must adopt construction of statute that maintains existing balance).

Likewise, the risk of federalizing state common law through RICO's conspiracy provision demands that some rational limit be placed on civil RICO conspiracy claims. The predicate act requirement, which has its foundation in RICO's text and purpose, represents the appropriate limit. *See Griffin*, 403 U.S. at 102 (the only way to prevent encroachment on state law is "by giving full effect to the congressional purpose").

29. *See* n.22, *supra*.

IV.

RICO'S LEGISLATIVE HISTORY AND REMEDIAL PURPOSES DO NOT SUPPORT THE MINORITY VIEW.

Beck concedes that "[t]here is no legislative history directly regarding the specific issue presented by [his] Petition, § 1964(c)'s civil remedies for conspiracies to violate RICO." Pet. Br. at 37 n.3. Therefore, Beck's legislative-history argument (Pet. Br. at 32-41) is of no moment because, as recognized in *Sedima*, Congress's intent is best determined by the statutory language it chooses. "Congressional silence, no matter how 'clanging,' cannot override the words of the statute." *Sedima*, 473 U.S. at 494 n.13. If Congress had wanted to provide RICO whistleblowers with standing for their retaliatory loss of employment injury, it could have done so, as it has done in several other statutes.[30]

Recognizing the absence of any legislative history capable of helping his case, Beck falls back on more generalized statements of RICO's "remedial purposes," its intent to "provide vigorous incentives for plaintiffs to pursue RICO claims," and its intent to "strengthen the evidence-gathering process." Pet. Br. at 34-38. This Court recognized these goals in *Holmes* but nevertheless limited RICO standing to those persons whose injuries are proximately caused by the illegal conduct. For the reasons set forth in Point II of this brief, fulfillment of these goals is not thwarted by limiting RICO standing to the preferred attorneys general — the direct victims of the illegal conduct.[31]

30. *See, e.g.*, 42 U.S.C. § 6971 (RCRA); 42 U.S.C. § 9610 (CERCLA); 31 U.S.C. § 3730(h) (False Claims Act); 12 U.S.C. § 1831j (Federal Deposit Insurance Act); 42 U.S.C. § 5851 (Energy Reorganization Act); 33 U.S.C. § 1367 (Clean Water Act); 49 U.S.C. § 31105 (Surface Transportation Assistance Act); 5 U.S.C. § 1213 (Federal Whistleblower Protection Act).

31. Moreover, RICO's liberal construction clause does not require rejection of the predicate act rule for conspiracy claims. As (Cont'd)

V.

THE ALLEGED RETALIATORY DISCHARGE WAS NOT AN OVERT ACT IN FURTHERANCE OF THE ALLEGED RICO CONSPIRACY AND THUS PROVIDES NO BASIS FOR RICO CONSPIRACY STANDING.

Beck asserts that after he contacted SIG's insurance regulators advising them that its financial statements were overstated, false causes were created to justify his termination. Pet. Br. at 11. He was terminated allegedly in retaliation for his whistleblowing.

But a retaliatory motive could not be "in furtherance of" the RICO conspiracy because the allegedly illegal acts had already been disclosed. Even courts in the minority agree that a retaliatory discharge is not "in furtherance of" a RICO conspiracy if the termination occurs after the employee has already exposed the fraudulent scheme and the termination is simply to punish him for blowing the whistle.[32] Here, because Beck had already exposed the alleged RICO conspiracy to the Florida insurance regulators,[33] his subsequent

(Cont'd)
this Court has observed, that clause "is not an invitation to apply RICO to new purposes that Congress never intended." *Reves*, 507 U.S. at 183. Here, the minority view would extend RICO to just such a purpose — deterring common law torts and remedying injuries caused by ordinary acts.

32. *See Schiffels*, 978 F.2d at 350-51, 353 (RICO conspiracy claim was deficient because plaintiff's allegations indicated "only that she was fired in retaliation for attempting to disclose the fraudulent scheme, not to further it or prevent its disclosure").

33. Under Florida law, the insurance regulators were obligated to investigate allegations of wrongdoing and had broad investigative powers. Fla. Stat. §§ 624.307 & 624.321; *Florida Dep't of Ins. and Treasurer v. Bankers Ins. Co.*, 694 So. 2d 70, 71-74 (Fla. App. 1997).

termination cannot be considered "in furtherance of" that conspiracy.[34]

Moreover, prior to Beck's termination, the SIG defendants' own actions resulted in the exposure of the wrongdoing at SIG. It was the SIG defendants who hired Firemark to audit SIG's operations, and it was Firemark whose investigation revealed the conduct that Beck alleges comprised much of the RICO violation. Since the SIG defendants themselves helped to expose the wrongdoing, their subsequent termination of Beck could not have been "in furtherance of" the conspiracy; the cat was already out of the bag.

34. *See also United States v. Steele*, 685 F.2d 793, 801 (3rd Cir.), *cert. denied*, 459 U.S. 908 (1982) (acts occurring after criminal bribery scheme was revealed to Governor of Puerto Rico were not committed "in furtherance of" the conspiracy); *cf. United States v. Maze*, 414 U.S. 395, 401-03 (1974) (under mail fraud statute, there was insufficient connection between mailings and execution of respondent's scheme where mailings "increased the probability that respondent would be detected and apprehended"). Moreover, even after the termination, nothing prevented Beck from further exposing the alleged fraud by continuing his conversations with the insurance regulators or, in his capacity as a substantial SIG shareholder, calling a shareholders' meeting and demanding an investigation. *See Casper v. Paine Webber Group, Inc.*, 787 F. Supp. 1480, 1500 (D.N.J. 1992) (plaintiff's termination was not in furtherance of RICO conspiracy because it "would not prevent her from disclosing the alleged illegalities, but rather invites [her] to disclose the alleged unlawful schemes").

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 19 1999
CLERK

No. 98-1480

(12)

In The

Supreme Court of the United States

ROBERT A. BECK, II,

Petitioner,

vs.

RONALD M. PRUPIS, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

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I. RESPONDENTS' INACCURATE COUNTER-STATEMENT OF FACTS IS INAPPROPRIATE.

The Eleventh Circuit stated that there was only one controlling question for its decision, beginning its December 15, 1998 opinion as follows:

> This case *hinges* on the following question: Must a plaintiff bringing a civil RICO conspiracy claim prove that the overt act (in furtherance of the conspiracy) by which he was injured was an "act of racketeering"? (emphasis added)

(CP App. 2). The Bellezza Respondents spend the first 10 pages of their Brief arguing the facts as they would ultimately present them to a jury.[1] This Petition, however, arises from a grant of summary judgment, and the courts must, therefore, construe the facts in favor of Beck.[2] Beck's Statement of the Facts is faithful to the factual recitations of the courts below. The odd spectacle of a *respondent* challenging the factual basis of the court of appeals' opinion alters neither the Eleventh Circuit's opinion nor the reason this Court granted certiorari. The question presented is not the factual dispute over

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[1] The Bellezza Respondents' Response Brief ("Bellezza Br.") at 8 even includes attacks on hearsay grounds that were not made at the district court level.

[2] One misstatement of the Record does require mention. The Bellezza Br. at 7 cites a March 5, 1991 letter opinion of the New Jersey District Court, which granted Firemark's Motion to Dismiss the Complaint, to argue that there is no *"evidence"* supporting Beck's claims. It is fundamental that a motion to dismiss does not involve the review of evidence. In fact, the evidence was not before the trial court, as the pertinent discovery had not yet taken place. *See also* Beck's Initial Brief ("Pet. Br.") at 11 (discussion of evidence relating to Firemark). Moreover, substantial additional evidence would have been filed on this and other issues had they been raised at the trial court level, rather than for the first time on appeal.

whether Beck's termination was an overt act in furtherance of a conspiracy; it is the legal question: assuming that his termination was an overt act in furtherance of a § 1962(d) conspiracy, does Beck have a right to sue under RICO?[3]

II. THE PLAIN LANGUAGE OF RICO CONFERS A PRIVATE RIGHT OF ACTION ON PETITIONER.

Respondents attempt to rewrite § 1964(c) to state that a person may sue thereunder only if he has been "injured in his business or property by reason of a *predicate act as defined by § 1961(1).*" Of course, that is not what the statute says. On the contrary, Congress provided a right to sue to any person injured "by reason of a violation of § 1962," which includes § 1962(d) conspiracies to violate § 1962(a)-(c).

---

[3] The Bellezza Respondents conclude their brief as they begin it, with a factual argument that was never made to any court below: they supposedly terminated Beck after the RICO conspiracy had ended and, therefore, Beck's termination was not an overt act in furtherance of the conspiracy. Bellezza Br. 42-43. This argument mischaracterizes the facts and law. As more fully detailed in Pet. Br. at 5-11, the Defendant Directors' illegal conduct continued for almost two years after Beck's termination, until the bankruptcy of SIG, and included thefts that Beck had prevented prior to his termination. Beck's termination for his refusal to participate in, his blowing the whistle on and his threat to the continued racketeering conduct of the Defendant Directors, was an overt act committed by the Defendant Directors in furtherance of their § 1962(d) conspiracy. *See generally United States v. Coia*, 719 F.2d 1120, 1124-1125 (11th Cir. 1983) ("where a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has terminated.") (quoting *United States v. Mayes*, 512 F.2d 637, 642 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975)).

Recognizing the force of the plain language of RICO, Respondents characterize its use as "overly mechanistic," accusing the courts whose decisions have stayed true to the statutory language of "reading RICO in a vacuum, without reference to RICO's central purpose of punishing racketeering activity." Bellezza Br. 14; *see also Beck v. Prupis*, 162 F.3d 1090, 1098-1099 (11th Cir. 1998), (CP App. 15-16); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 48 (1st Cir. 1991). This argument ignores the canon of statutory construction that courts must, absent an ambiguity, adhere to the text of a statute. *See* Pet. Br. 17-21. Overriding this plain language with a perceived notion of what Congress's intent supposedly *should* have been violates fundamental principles of separation of powers.

Respondents attempt to support their arguments by quoting, out of context, passages from *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Bellezza Br. 15-17. On these issues, however, the Court in *Sedima* dealt solely with the plaintiff's § 1962(c) claim – the Court's discussion did not involve the plaintiff's § 1962(d) claim at all. The Court rejected the Second Circuit standard, which would have grafted a "racketeering injury" requirement onto RICO, and instead relied on the statutory language. *Sedima*, 473 U.S. at 494-500.

There is no justification for incorporating a predicate act injury requirement, an essential element only for a § 1962(c) claim (by virtue of the language of that section), into a § 1962(d) claim. *See Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 349 (7th Cir. 1992) (*Sedima* does not apply to § 1962(d) claims); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1169 (3d Cir. 1989) (same). The best Respondents can do here is to fall back on their misguided notion that Congress's intent in enacting RICO was to combat predicate acts. Bellezza Br. 14-17. Even if this were not flatly wrong, see Section VII, *infra*, in any

event, the "statement that the plaintiff must seek redress for an injury caused by conduct that RICO was designed to deter is unhelpfully tautological." *Sedima*, 473 U.S. at 494.

Moreover, importing a predicate act injury requirement into a § 1962(d) claim would render that section superfluous to § 1962(c) in the civil context (§ 1964(c) provides a civil remedy for a violation of all four of the subsections of § 1962). Pet. Br. 19-20; *see also* Section III, *infra*. In fact, if a predicate act injury requirement were written into RICO, not only would § 1962(d) become superfluous to § 1962(c) in the civil context, but so would § 1962(a) and § 1962(b). As with subsection (d), neither subsection (a) nor (b) provides remedies for the victims of predicate acts. Thus, Respondents' argument would rewrite § 1964(c) to provide civil remedies only for violations of § 1962(c), a result plainly at odds with the actual language of the statute.[4]

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[4] Amicus Washington Legal Foundation (the "WLF") goes even farther, contending that there can never be a civil RICO claim arising from a violation of § 1962(d). They reason that because, under criminal RICO, "nothing more" than an agreement to violate RICO is needed to establish an indictable RICO conspiracy, it follows that "[a]n overt act done in furtherance of a conspiracy" is not part of that conspiracy and "not 'conduct constituting a violation' of § 1962(d)." WLF Br. at 8. The WLF thus erroneously converts the *minimum requirement* for § 1962(d) – an agreement to violate RICO – into an *exclusive definition* – nothing beyond the bare agreement counts as part of the violation. This ignores § 1964(c), which expressly requires an injury, which, in the case of § 1962(d), must be caused by an overt act. The absurdity of the WLF's reasoning is further revealed by its consequence: because one cannot be injured by the agreement alone, and because § 1964(c) provides a remedy only for those "injured . . . by reason of" a violation of § 1962(d), and because (under the WLF theory) overt acts in furtherance of the agreement cannot constitute part of the conspiracy violation, it follows, according to the WLF, that *"RICO does not authorize suits for civil conspiracy."* WLF Br. at 11 (emphasis added). The explicit text of § 1964(c), of course, provides otherwise. Respondents' amicus thus urges this Court to amend RICO to delete a civil cause of action provided by Congress.

Respondents theorize that, under the plain language of § 1964(c), an "artful pleader" could circumvent the requirements of § 1962(a)-(c). Bellezza Br. 17-18. This contention has already been answered. *See* Pet. Br. 39-41. Respondents, however, have escalated this argument to a new level, arguing that any other interpretation would render all of § 1962(a)-(c) superfluous. Respondents are mistaken. Each section of § 1962 provides a separate and distinct civil remedy under § 1964(c): actions under § 1962(a) for injuries proximately caused by an investment of proceeds derived from a pattern of racketeering; actions under § 1962(b) for injuries proximately caused by acquisition through a pattern of racketeering activity of any interest in an enterprise; actions under § 1962(c) for injuries proximately caused by conducting the affairs of the enterprise through a pattern of racketeering; and actions under § 1962(d) for injuries proximately caused by conspiracies to violate sections (a), (b) and (c). While some fact patterns might occasionally create some overlapping claims, these are separate and distinct causes of action. *See also Shearin*, 885 F.2d at 1170 ("it would be anomalous to allow plaintiffs to recover for harm suffered from investment in, or control or conduct of, a pattern of racketeering, yet preclude recovery for conspiracy to commit these violations simply because the overt act that furthers the conspiracy does not itself qualify as racketeering.").

Finally, Respondents argue that the literal reading of RICO should be rejected to avoid "absurd results." The

purportedly absurd results Respondents forecast, however, are eliminated by the proximate cause analysis required by *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).[5] *See id.* at 276 (a "review of the conflicting cases shows that all could have been resolved on proximate-causation grounds."); Pet. Br. 27-32; Section IV, *infra*.[6]

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[5] The hypothetical raised in the Bellezza Br. at 19, regarding a campaign of defamation designed to discredit a non-employee threat to a RICO conspiracy, is inapposite, as other aspects of RICO jurisprudence also would bar any such suit, specifically that a person who has been defamed has not been injured in his "business or property." *See, e.g., Grogan v. Platt*, 835 F.2d 844, 846-847 (11th Cir. 1988).

[6] Respondent Mezey's Brief at 8-10 argues that RICO's pattern element is void for vagueness. This argument was never raised in any court below nor is it fairly included within the question presented on this Petition. Moreover, in *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), this Court defined this very element. *See, e.g., Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101 (6th Cir. 1995) (RICO pattern element not unconstitutionally void), *cert. denied*, 516 U.S. 1158 (1996). The pattern of racketeering activity at issue in this case (Pet. Br. 1-11) includes mail fraud, wire fraud and extortion, all of which certainly provide notice of the potentially criminal conduct. Mezey cannot escape RICO liability by way of a vagueness challenge on the ground that he was allegedly unaware of the extent of the direct repercussions of the overt acts committed in furtherance of the already illegal conspiracy. *See, e.g., U.S. v. Masters*, 924 F.2d 1362, 1367 (7th Cir.), *cert. denied*, 500 U.S. 919 (1991).

III. A DISTINCTION BETWEEN CIVIL AND CRIMINAL RICO CONSPIRACIES IS NOT SUPPORTED BY THE LANGUAGE OF RICO OR THE COMMON LAW.

A. The Language of RICO Leaves No Room for a Civil/Criminal Distinction as to the Single Phrase, "To Conspire."

The words "to conspire" appear only once in § 1962. Respondents argue that this single statutory phrase should have two completely different meanings depending on the context involved, criminal or civil. Bellezza Br. 20-22. This argument, however, violates a fundamental principle of statutory construction: "A term appearing in several places in a statutory text is generally read the same way each time it appears. We have even stronger cause to construe a single formulation . . . the same way each time it is called into play." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994); *see also United States v. Nippon Paper Industries Co.*, 109 F.3d 1, 4 (1st Cir. 1997) (" . . . common sense suggests that courts should interpret the same language in the same section of the same statute uniformly, regardless of whether the impetus for interpretation is criminal or civil.").[7] Here, there is similarly

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[7] *See also United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517 (1992) (applying language in statute consistently in both tax and criminal settings); *Citron v. Citron, M.D.*, 722 F.2d 14, 16 (2d Cir. 1983) ("Nothing in the statute or in its legislative history suggests that Congress intended different standards of willfulness to be applied in the civil and criminal contexts. Nor does it seem logical that the same term, 'willfully', in the same statute, § 2511, should have any different meaning when applied directly to a criminal violation than when the same violation is incorporated by reference to establish civil liability."), *cert. denied*, 466 U.S. 973 (1984).

no justification to interpret the single phrase, "to conspire," differently depending on whether the statute is invoked in a civil or a criminal proceeding.[8]

Respondents contend that the civil remedy for a RICO criminal conspiracy provided by § 1964(c) is merely a procedural device to impute liability to co-conspirators, as opposed to a substantive civil claim for which plaintiffs may bring an action. Bellezza Br. 23-25. Respondents, however, confuse the distinction between substantive claims and conspiracy claims with the dichotomy between substantive causes of action and procedural devices. By its terms, § 1964(c) creates "Civil Remedies," not mere procedural devices, and provides causes of action to plaintiffs injured by reason of violations of § 1962(a), § 1962(b), § 1962(c) or § 1962(d). The interpretation of § 1962(d) urged by Respondents cannot be reconciled with the statute's structure.

Finally, RICO is a criminal statute. While it does provide civil remedies as well, those remedies are for *violations of this criminal statute* and RICO conspiracy claims under § 1964(c) must be understood in that light. Here, an overt act committed in furtherance of a RICO conspiracy in violation of § 1962(d) has directly injured

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[8] Respondents attempt to justify their criminal/civil distinction by noting obvious procedural differences between civil and criminal RICO proceedings, including burdens of proof and statute of limitations. Bellezza Br. 21-22. These differences, however, do not arise from different interpretations of a single statutory phrase. On the contrary, as even Respondents concede, when RICO terms such as "conduct," "enterprise" and "pattern of racketeering" are at issue, the identical meaning is applied in both civil and criminal contexts. *Id.* at 22. This applies with equal force to the statutory language, "to conspire."

Beck. Nothing further is required under the statute to provide Beck with a right to sue.

B. An Independent Claim for a Civil Conspiracy Existed at Common Law.

Even if using two different meanings for the single phrase, "to conspire," were appropriate, Respondents' argument would still be based upon a false premise, because the common law itself recognizes an independent action for a civil conspiracy:[9]

> [A]lthough the general rule is that "an act which constitutes no ground of action against one person cannot be made the basis of a civil action for conspiracy," in certain circumstances mere force of numbers acting in unison may comprise an actionable wrong. In essence . . . ordinarily there can be no independent tort for conspiracy. However, if the plaintiff can show some peculiar power of coercion possessed by the conspirators by virtue of their combination, which power an individual would not possess, then conspiracy itself becomes an independent tort. The essential elements of this tort are a malicious motive and coercion through numbers or economic influence.

Churruca v. Miami Jai-Alai, Inc., 353 So.2d 547, 550 (Fla. 1977) (citations omitted). In fact, a cause of action for an independent tort of conspiracy is recognized throughout

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[9] At minimum, even ignoring RICO's criminal underpinnings, the common law is not so well-established on this civil issue so as to justify an assumption that Congress imported a different rule into the RICO statute.

the states.[10] Respondents are therefore simply wrong in claiming that, at common law, the overt act in a civil conspiracy action must itself constitute the underlying unlawful act.[11]

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[10] *See, e.g., Shaltupsky v. Brown Shoe Co.*, 350 Mo. 831, 835 (Mo. 1943) (noting common law independent civil conspiracy action and stating that "[t]he result of this greater power of coercion is that what is lawful for an individual is not the test of what is lawful for a combination of individuals."); *Fleming v. Dane*, 22 N.E.2d 609, 611 (Mass. 1939) ("The most common illustration of such a 'conspiracy' is to be found in the combined action of groups of employers or employees. . . . "); *Braswell v. Carothers*, 863 S.W.2d 722, 727 (Tenn.App. 1993) ("The requisite elements of the cause of action are common design, concert of action, and an overt act. Injury to person or property, resulting in attendant damage, must also exist." (citations omitted)); *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 483 S.E.2d 789, 795 (S.C.App. 1997) ("An action for civil conspiracy may exist even though defendants committed no unlawful act and no unlawful means were used."), *affd. in part, revd. in part on other grounds*, 514 S.E.2d 126 (S.C. 1999); *Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d 358, 371 (Ill. 1998).

[11] The Bellezza Br. at 29 n.19 cites *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993), for the proposition that, without a substantive RICO claim, no conspiracy to violate RICO can exist. In *Rehkop v. Berwick Healthcare Corp.*, 95 F.3d 285, 290 (3d Cir. 1996), however, the Third Circuit rejected this very argument, noting that *Lightning Lube* involved a situation where the acts complained of were not violations of § 1962(a)-(c) and thus "failed to serve as the object of a section 1962(d) conspiracy." The same distinction disposes of the remaining cases cited for this point in the Bellezza Br. Here, as in *Rehkop*, Beck has provided proof of violations of § 1962(c). "The reason he cannot pursue such a claim is that he was not harmed by the section 1962(c) violation. Nonetheless, the defendants' alleged violation of section 1962(c) can serve as the object of a section 1962(d) conspiracy, and if [the complaining party] was harmed by reason of the conspiracy, he may pursue a section 1962(d) claim." *Rehkop*, 95 F.3d at 290.

IV. BECK'S INJURIES WERE PROXIMATELY CAUSED BY THE DEFENDANT DIRECTORS' CONSPIRACY TO VIOLATE RICO.

Although Beck was not injured by the predicate acts committed as part of the RICO conspiracy, that fact would be relevant only if Beck's claim was brought under § 1962(c), instead of § 1962(d). Beck's injuries were directly caused by the RICO conspiracy and, therefore, under *Holmes*, were proximately caused by the violation of § 1962(d).

Contrary to Respondents' bald assertions, Beck was injured in the "first step" of causation under the conspiracy alleged. *Holmes*, 503 U.S. at 271-272. In the chain of causation, no person or event stands between the overt act of terminating Beck in furtherance of the conspiracy and Beck's injuries. The injuries flow directly from that overt act. In no way is Beck complaining about injuries he suffered "merely from the misfortunes visited upon a third person by the defendant's acts . . . ." *Id.* at 268. There is a "direct relation between the injury asserted [Beck's termination] and the injurious conduct alleged [the Defendant Directors' RICO conspiracy]." *Id.* While Beck's injuries are not in the linear chain of harm resulting from the predicate acts, his injuries are the first link in the chain of harm caused by the overt acts committed in furtherance of the conspiracy itself, which, pursuant to the plain meaning of § 1964(c), is the only issue for a proximate cause analysis of a civil claim brought under § 1962(d).[12]

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[12] As more fully detailed in Pet. Br. at 29-31, the underlying reasons for the directness requirement are met here. Beck's damages are easily ascertainable, as he is the only person to have suffered this loss of employment – there are no potential multiple recoveries as to these damages. While victims of the

Respondents' attempt to divorce Beck's termination from the RICO conspiracy by asserting that a state wrongful discharge suit would be "simpler and more administratively convenient," Bellezza Br. 32, adds nothing to the proximate cause analysis. Beck's termination was an overt act committed in furtherance of the RICO conspiracy. Accordingly, Beck was directly injured by the violation of § 1962(d) and he has satisfied the proximate cause analysis required by *Holmes*. The fact that a "simpler" cause of action also may exist is irrelevant to the issue of proximate cause, especially given that Congress enacted RICO to supplement existing state law remedies. *See Sedima*, 473 U.S. at 498-499.

V. THE "ANTITRUST INJURY" ANALOGY URGED BY RESPONDENTS HAS ALREADY BEEN REJECTED BY THIS COURT.

Respondents urge this Court to rewrite RICO to incorporate a "racketeering injury" requirement analogous to the "antitrust injury" required under the Clayton Act. Bellezza Br. 35-37. Yet this Court has expressly rejected the application of "antitrust standing principles"

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predicate acts have suffered their particular damages, the RICO conspirators must be liable for all injuries directly caused by their conspiracy. Respondents' argument that these potential multiple awards to the various direct victims of the racketeering conduct for the injuries that each person and only that person suffered (including Beck) somehow impacts the proximate cause issue distorts *Holmes*. The focus of *Holmes* on this element only involved apportionment of damages and multiple recoveries for *identical* conduct and damages. *Holmes*, 503 U.S. at 269, 272-273. Last, Respondents' deterrence arguments ignore the undeniable deterrent provided by whistleblowers, who may, by being the first wave of deterrence, actually prevent predicate acts and the associated injuries from occurring. *See* Pet. Br. 30, 37-38.

to RICO civil actions. *Sedima*, 473 U.S. at 498-499; *see also Holmes*, 503 U.S. at 269 n.15 (" 'antitrust injury' has no analogue in the RICO setting"). Respondents ask the Court to graft language onto RICO to redefine the injuries redressable under the statute, when the simple answer to the problem of endless ripples of civil RICO liability is application of the time-honored test for proximate cause. *See Holmes*, 503 U.S. at 268-271, 276; *see also id.*, 503 U.S. at 286 (O'Connor, J., concurring).[13] Respondents thus offer a remedy already rejected by this Court in *Sedima* for a problem already solved by this Court in *Holmes*.

The Respondents insist that they "do not seek to resurrect the 'racketeering' . . . injury requirement[ ]," Bellezza Br. 36 n.25, but they protest too much. The "racketeering activity" injury requirement they urge, Bellezza Br. 36, is, at best, a distinction without a difference. Like the unsuccessful respondents in *Sedima*, Respondents here repeatedly invoke "antitrust injury" and "antitrust damage," Bellezza Br. 26 n.18, 27 n.18, 35, 37, and they cite the very same antitrust precedents this

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[13] The proximate cause requirement already "confine[s] RICO's civil remedies to those whom the defendant has truly injured in some meaningful sense." *Holmes*, 503 U.S. at 279 (O'Connor, J., concurring). Respondents themselves indicate that the goal of their proposed rewrite of RICO is to ensure that employees fired in furtherance of a RICO conspiracy may recover under § 1964(c) only if they are " 'proximately' injured" by that conspiratorial misconduct. Bellezza Br. 38. Proximate cause, however, is not a concept unique to antitrust law, see Bellezza Br. 30-32 & n.21, 34-35, nor was it commended to this Court in *Holmes* solely by its employment under the Clayton Act. Rather, proximate cause is a general (and sensible) common-law limit on damages liability that is almost as old as the common law itself. *Holmes*, 503 U.S. at 268, 271; *see also id.* at 287 (Scalia, J., concurring in the judgment).

Court dismissed as inapposite in *Sedima*.[14] Similarly, just as the respondents did in *Sedima*, Respondents here ask the Court to read a new limitation into § 1964(c), so that a person "injured in his person or property by reason of a violation of section 1962" will have to prove not only that he has been injured "by reason of" a RICO conspiracy in violation of § 1962(d), but also that he has suffered a "racketeering activity" injury by reason of a violation of § 1962(c). Respondents' proposed judicial amendment to RICO may appear to be more modest than that urged in *Sedima*, but it is no more permissible. "There is no room in the statutory language for an additional . . . requirement." *Sedima*, 473 U.S. at 495.

This Court used the Clayton Act to inform its reading of RICO in *Holmes* because the two statutes used identical language in formulating the causation requirement – "by reason of." However, there is no similar textual justification for using antitrust doctrine to interpret civil RICO's injury requirements, because there are no similar parallels in the RICO text at issue here. Section 1964(c) provides a civil remedy for injuries from § 1962 violations, and that includes not only the racketeering activity forbidden by subsections (a), (b) and (c), but also the conspiracy to violate those subsections, which is expressly made "unlawful" by subsection (d). The antitrust statutes are organized differently, with the prohibition on conspiracies in restraint of trade being made part of the substantive definition of the antitrust violation. *See* 15 U.S.C. § 1. There is simply no textual support in the antitrust statutes for the distinction that Respondents ask this Court to

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[14] Compare Bellezza Br. 35, 36 (discussing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982)), with Br. of Respondents in *Sedima*, No. 84-648 at text accompanying n.26; n.31 (same). *See also Sedima*, 473 U.S. at 512-514 (Marshall, J., dissenting) (same).

legislate here – between injury from a predicate act that is part of a conspiracy and injury from a wrongful overt act that is also part of that conspiracy.

The use of a special "antitrust injury" requirement to deny standing under the antitrust laws to most discharged employees makes sense in the antitrust context, because the "clear focus" of the antitrust laws is "to promote free competition," not to provide civil relief "for all wrongdoing in the business community." *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 751 (9th Cir. 1984) (Kennedy, J., dissenting), *cert. dism'd*, 469 U.S. 1200 (1985). Antitrust standing is therefore generally limited to consumers and competitors of the defendant. *Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538 (1983).[15] In stark contrast, there is no such limitation in RICO to a particular type of economic harm or a particular type of anticompetitive conduct or other economic motive. Instead, recovery may be had by "*[a]ny* person injured in his business or property by reason of a violation of section 1962." § 1964(c) (emphasis added). Civil RICO liability does not even require *any* economic motive. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 252 (1994). The policy concerns in the antitrust employee discharge cases, apart from this "antitrust injury" focus, are met in the RICO context, as they are in antitrust as well, by reliance on the proximate cause requirement. *Ostrofe*, 740 F.2d at 750 (Kennedy, J., dissenting) (issue is whether plaintiff "has standing to challenge the price-fixing conspiracy as

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[15] The special "antitrust injury" inquiry was adopted to ensure not only that a plaintiff's injury has been caused by a defendant's conduct in the market, but also that the injury results from an *anti*competitive rather than a *pro*competitive aspect of that conduct. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 335-336 (1990).

the proximate cause of his discharge injury"); compare *id.* at 749 (discussing proximate cause analysis) with *Holmes*, 503 U.S. at 269-270 (proximate cause) and Pet. Br. 28-30 (same). Therefore, there is neither need nor legal justification for using antitrust law to redefine and restrict the injuries for which Congress has provided redress under the broad terms of § 1964(c).

VI. APPLYING RICO AS WRITTEN WILL NOT SUBVERT FEDERALISM.

For the first time in this case, Respondents here contend that a decision that enforces the plain language of RICO and rejecting a predicate act injury requirement would violate federalism principles and encroach on the employer-employee relationship, an area that, according to the Respondents and their amici, is solely the province of state law. Bellezza Br. 38-40. However, as this Court made clear in *United States v. Turkette*, 452 U.S. 576 (1981), the fact that RICO may reach conduct already regulated by state law, both criminal and civil, is not some unintended result of a wayward judicial construction. On the contrary,

> [t]he view [of Congress] was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions. . . . As the hearings and legislative debates reveal, Congress was well aware of the fear that RICO would mov[e] large substantive areas formerly totally within the police power of the State into the Federal realm.

Id. at 586-587 (citations omitted). As this Court explained, RICO does not undermine state authority, because it merely supplements state remedies, rather than preempting them:

> RICO imposes no restrictions upon the criminal justice systems of the States. *See* 84 Stat. 947

> ("Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or *affording civil remedies* in addition to those provided for in this title"). Thus, under RICO, the States remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions. That some of those crimes may also constitute predicate acts of racketeering under RICO, is no restriction on the separate administration of criminal justice by the States.

Turkette, 482 U.S. at 587 n.9 (emphasis added); *see also Sedima*, 473 U.S. at 498 (noting supplementary function of RICO); *Westfall v. United States*, 274 U.S. 256, 258 (1927) (Holmes, J.) ("Of course an act may be criminal under the laws of both jurisdictions . . . Moreover, when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so.").[16] Moreover, RICO does not in any way divest state sovereigns of the power to adjudicate employer-employee relationships, as concurrent jurisdiction exists under RICO. *Tafflin v. Levitt*, 493 U.S. 455 (1990).[17]

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[16] "There is no argument that Congress acted beyond its power in so doing," *Turkette*, 452 U.S. at 587, especially given that RICO's purview is limited to acts that affect interstate commerce. *See especially* 18 U.S.C. § 1962.

[17] Respondents attempt to divorce the overt act committed in furtherance of the RICO conspiracy from the RICO conspiracy itself. The former is part and parcel of the latter. As Congress had the full authority to provide federal treble damages relief for conspiracies to violate RICO to effectuate its manifest purpose of eradicating organized crime in cases affecting interstate commerce, as a supplement to already existing state law, the fact that this cause of action also reaches areas on which the states are also free to legislate does not violate any principles of federalism.

Respondents' professed concern about federal regulation of employment relationships is behind the times. Bellezza Br. 39. Since at least the New Deal, a plethora of federal statutes have regulated (and in some cases preempted) the terms and conditions of employment relationships where activities affect interstate commerce. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*; the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*; the Occupational Safety and Health Act, 29 U.S.C. § 651, *et seq.*; the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*; the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*; the Labor Management Relations Act, 29 U.S.C. § 185, *et seq.*; the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1801; and the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*[18]

Respondents' main authority on federalism, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), Bellezza Br. 39-40, actually undermines their argument. In *Bray*, the Court concluded that 42 U.S.C. § 1985(3) should not be read to "mak[e] a whole catalog of ordinary state crimes a concurrent violation of a single congressional statute," 506 U.S. at 287 (Kennedy, J., concurring), because that statute was enacted to redress a particular type of injury with a particular motivation: invidious, class-based discriminatory animus. The Court therefore

[18] The amicus brief of the American Tort Reform Association at 12-13 argues that providing a person such as Beck with a right to sue under RICO will upset the balance relating to labor/employment issues. These are the same slippery slope arguments already rejected by this Court in *Sedima*, 473 U.S. at 498-500. Nothing in RICO justifies carving an exception for the employment setting. On the contrary, RICO was designed, *inter alia*, to protect businesses from the encroachment of organized crime.

held that § 1985(3) did not provide a federal cause of action against persons obstructing access to abortion clinics. The contrast with RICO could not be more dramatic. First, the manifest purpose of civil RICO was indeed to make a "whole catalog" of state crimes a concurrent violation of federal civil racketeering law and thereby to provide federal treble damages relief for racketeering conspiracies involving, among other things, routine frauds and other acts sanctioned by state law. Second, RICO contains no motivation limitation analogous to class-based animus under § 1985(3); indeed, RICO offenses do not even require an economic motive, and that is why RICO, unlike § 1985(3), has been held to provide a cause of action against persons who conspire to disrupt abortion clinics. *See National Organization for Women*, 510 U.S. at 252, 255-256.[19]

VII. RECOGNIZING STANDING ON THE PART OF WHISTLE BLOWERS FURTHERS THE PURPOSE OF RICO.

An abiding theme of Respondents' briefs is that the plain meaning of the statute should not control, given RICO's supposed "central purpose" to punish predicate acts. *See, e.g.*, Bellezza Br. 14-17. Congress's purpose in enacting RICO, however, was not to punish predicate acts – those acts were already punishable under the myriad state and federal laws making the predicate acts, themselves, criminal violations. Rather, Congress was concerned with creating new weapons to combat organized crime and, specifically, the infiltration of businesses by

[19] *See also Haddle v. Garrison*, 525 U.S. 121 (1998) (at-will employee terminated for whistle blowing had been injured by conspiracy in violation of 42 U.S.C. § 1985(2), notwithstanding existence of state remedies).

criminal elements. *See Turkette*, 452 U.S. at 590-591 and n.13. This purpose fully supports providing a RICO claim to employees injured when they are terminated for resisting the infiltration of business by a criminal enterprise or for blowing the whistle on the RICO conspiracy. *See* Pet. Br. 32-36.[20]

CONCLUSION

For the foregoing reasons and those more fully stated in Beck's Initial Brief on the Merits, the judgments below should be reversed and the case should be remanded for further proceedings, including trial.

Respectfully submitted,

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[20] In the various regulatory statutes cited by the Bellezza Br. at 41 n.30, Congress included specific language creating a cause of action for whistle blowers because those laws did not also contain a more general private civil right of action. No such specific attention to the whistle blower scenario was necessary under RICO, because § 1964(c) already confers the right to sue upon any person injured by a § 1962 violation, including a § 1962(d) conspiracy.

Supreme Court, U.S.
FILED
JUL 21 1999
OFFICE OF THE CLERK

(4)

No. 98-1480

In The

Supreme Court of the United States

ROBERT A. BECK,

Petitioner,

v.

LEONARD BELLEZZA, ERNEST J. SABATO, WILLIAM PAULUS, JR., HARRY OLSTEIN, FREDERICK C. MEZEY, JOSEPH S. LITTENBERG,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL WHISTLEBLOWER CENTER

The National Whistleblower Center (Center)[1] is a nonprofit, tax-exempt, non-partisan, charitable, and educational organization dedicated to the protection of employees who "blow the whistle" and report misconduct in the workplace. In both the public and private sector, the Center assists employee whistleblowers who have been, *inter alia*, discriminated against for reporting violations of law and public safety.

In addition to its involvement in whistleblower litigation, the Center remains active in the education and advocacy of whistleblower protection. The Center sponsors and participates in public education programs and training seminars throughout the country. Furthermore, the Center operates an Attorney Referral Service for whistleblowers (with attorney members in 33 states) and maintains an in-depth and informative Internet web site at *www.whistleblowers.org*. The Center was admitted by this Court as an *amici* in *English v. General Electric*, 496 U.S. 72 (1990) and *Haddle v. Garrison*, 119 S.Ct. 489 (1998).

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[1] Counsel for Petitioner Robert A. Beck, II and Respondents Leonard Bellezza, Ernest J. Sabato, William Paulus, Jr., Harry Olstein, Frederick Mezey and Joseph S. Littenberg consented to the filing of an *amicus curiae* brief by the Center in this matter.

Pursuant to Rule 37.6, the Center maintains that no monetary contributions were accepted for the preparation or submission of this *amicus curiae* brief and that the Center's counsel, Stephen M. Kohn, Michael D. Kohn, and David K. Colapinto authored this brief in its entirety.

SUMMARY OF THE ARGUMENT

The plain meaning of Title IX of the Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations, ("RICO"), 18 U.S.C. § 1964(c), conveys standing to persons who are victimized by their attempts to disclose or oppose racketeering activities under civil RICO provisions.

Under long-standing rules of statutory construction, as articulated in *Caminette v. United States*, 242 U.S. 470, 490 (1917), if the plain meaning of the statute does not lead to an absurd or impracticable result, the plain meaning must be followed. Applying this rule to 18 U.S.C. § 1964(c), the statute unquestionably conveys standing to persons "injured" in their "property" (i.e., loss of employment), and when they are victimized "by reason of" exposing their employer's RICO violations.

By conveying standing, this court will not create a panacea for all employment discharge cases. Rather, the court will allow redress for cases which meet the strict specificity requirements under RICO. The specificity required in pleadings and the level of proof necessary to meet RICO requirements will limit the number of cases for adjudication to those fostering Congress' intent to eradicate illegal racketeering.

ARGUMENT

I. THE PLAIN MEANING OF 18 U.S.C. § 1964(c) CONVEYS STANDING TO PERSONS WHO ARE VICTIMIZED BY THEIR ATTEMPTS TO DISCLOSE OR OPPOSE RACKETEERING ACTIVITIES UNDER THE CIVIL RICO PROVISIONS.

This case concerns the interpretation of a civil plaintiff's standing pursuant to Title IX of the Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations ("RICO"), which provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court . . .

18 U.S.C. § 1964(c).

The first step in interpreting legislation is to determine what the words of the statute say.[2] Unless defined otherwise, words should be given their plain meaning. This court enunciated the plain meaning doctrine in *Caminette v. United States*, 242 U.S. 470, 490 (1917) when it stated "the language being plain and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."

Here, there is no absurd or wholly impracticable consequence of applying the plain meaning. The Crime

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[2] *See Lewis v. United States*, 445 U.S. 55, 58 (1980) ("The Court has stated repeatedly of late that in any case concerning the interpretation of a statute the 'starting point' must be the language of the statue itself.")

Control Act of 1970 states as its purpose to "seek eradication of organized crime in the United States by strengthening the legal tools in the *evidence-gathering process*, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Organized Crime Control Act of 1970*, Pub. L. No. 91-452, 1970 U.S.C.C.A.N. (84 Stat.) 922 (emphasis added). If the purpose of the statute is eradication of organized crime, then exposure of the crime's existence is a mandatory first step in achieving Congress' purpose. The civil RICO provision, on its face, is sufficiently broad to protect persons who take this first step in crime prevention.[3]

Granting standing to persons victimized for disclosing or opposing illegal racketeering to obtain damages caused "by reason of" the racketeering activities is not impracticable or absurd. However, stripping these invaluable witnesses of meaningful protection will eviscerate "Congress' purpose in enacting" civil RICO.[4]

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[3] *See Bowman v. Western Auto Supply Co.*, 985 F.2d at 389, "Bowman may not able to prove that his firing took place in furtherance of a conspiracy to commit fraud, but he should be given that opportunity. A contrary holding assures employers that when troublesome employees threaten to disclose the commission of RICO violations, those employees can be threatened with termination to keep such violations hidden from public view." (Heaney, J., dissenting)

[4] *Id.* at 383.

II. ALLOWING STANDING TO EMPLOYEES DISCHARGED AS A RESULT OF DISCLOSING EMPLOYER'S RICO VIOLATIONS IS A NARROWLY TAILORED REMEDY FOR A UNIQUE BRAND OF CASES

In *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3rd Cir. 1989), the court of appeals found standing for an employee terminated for making disclosures about her employer's alleged RICO violations. In finding standing, the Third Circuit evaluated the facts of the case scrupulously and the employee was required to meet a substantial burden in demonstrating her case. *Id.* at 1165-69.

Based on the specificity requirements of the RICO statute and the stringent court analysis required to meet the specificity burden, only a narrow class of employment termination actions will meet these substantial requirements.[5] Victims who can meet these standards clearly fall within the class of persons Congress intended to protect from the egregious activities of illegal racketeering. Any other interpretation of the statute would lead to an absurd result.

Interpreting civil RICO as permitting the financial ruin of persons courageous enough to alert the appropriate authorities to violations of the criminal RICO statute is inconsistent and destructive to the letter of the law and the intent of Congress.

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[5] *Accord, Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143 (5th Cir. 1997); *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344 (7th Cir. 1992).

CONCLUSION

For the foregoing reasons, this Court should uphold Petitioner's argument and reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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July 20, 1999

Supreme Court, U.S.
FILED
SEP 17 1999
OFFICE OF THE CLERK

No. 98-1480

IN THE

Supreme Court of the United States

ROBERT A. BECK, II,

Petitioner,

v.

RONALD M. PRUPIS, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENTS

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September 17, 1999

BEST AVAILABLE COPY

IN THE

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ROBERT A. BECK, II,

Petitioner,

v.

RONALD M. PRUPIS, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37.3(b) of the Rules of this Court, Washington Legal Foundation and Allied Educational Foundation respectfully move this Court for leave to file the attached brief as *amici curiae* in support of the respondents. The petitioner has consented to the filing of this brief as has each of the respondents except for respondent Ronald M. Prupis. Mr. Prupis, who is in bankruptcy proceedings, has indicated that, on advice of his bankruptcy counsel, he will not participate in this case. Mr. Prupis's withholding of consent necessitates the filing of this motion.

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in

Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and publishing educational materials that promote, *inter alia*, a limited and accountable government, the proper role of the judiciary, civil justice reform, and reasonable government regulation.

To that end, WLF has appeared before this Court as well as other federal and state courts to argue against overly expansive theories of tort liability, excessive punitive damages, and imposition of unwarranted attorney fee awards. Of particular relevance to this case, WLF has appeared as *amicus* in this Court arguing against an overly expansive interpretation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq*. *See, e.g., H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989); *Rotella v. Wood*, 147 F.3d 438 (5th Cir. 1998), *cert. granted,* 67 U.S.L.W. 3559 (U.S. Mar. 8, 1999) (No. 98-896).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* along with WLF in numerous cases before this Court, including *Rotella v. Wood*.

WLF and AEF are concerned that the reflexive invocation of RICO by civil litigants engaged in otherwise garden-variety commercial disputes does violence to the original purpose of RICO and unnecessarily burdens our federal judicial system. While Congress adopted RICO as a tool to fight organized crime, civil RICO is now invoked primarily in "everyday fraud cases brought against respected and legitimate enterprises." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985). The instant case presents another example of the attempt by litigants to stretch the application of RICO further than what Congress intended. WLF and AEF believe that

their participation in this case as *amici curiae* will assist the Court in resolving the issues presented.

Accordingly, WLF and AEF respectfully request that they be granted leave to file the annexed brief.

Respectfully submitted.

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September 17, 1999

QUESTION PRESENTED

Whether 18 U.S.C. § 1964(c), which gives a civil cause of action to persons "injured" by a "violation" of the criminal provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(a)-(d), authorizes civil suits for a "violation" of the RICO conspiracy statute, 18 U.S.C. § 1962(d), even though "violation[s]" of that criminal statute harm only the public at large and do not "injure" any particular individual.

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BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENTS

Washington Legal Foundation and Allied Educational Foundation respectfully submit this brief *amici curiae* in support of the respondents.

INTERESTS OF *AMICI CURIAE*[1]

The interests of *amici curiae* Washington Legal Foundation and Allied Educational Foundation are set forth in the preceding Motion for Leave To File Brief *Amici Curiae*.

STATEMENT

This case arises out of the bankruptcy proceedings of Southeastern Insurance Group (SIG), a Florida-based holding company that owned various subsidiary businesses, including subsidiaries that issued surety bonds to construction contractors. Respondents are former directors of SIG. Petitioner, a former president of SIG, sued respondents under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et. seq.*, alleging, *inter alia*, that respondents conspired to violate RICO, *see* 18 U.S.C. §§ 1962(d) & 1964. The United States District Court for the Southern District of Florida entered summary judgment against petitioner. The court

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[1] Pursuant to Sup. Ct. R. 37.6, no counsel for a party in this case authored this brief in whole or in part, and no persons or entities other than *amicus* Washington Legal Foundation, its supporters, or counsel, contributed financially to the preparation or submission of this brief.

of appeals affirmed. *See Beck v. Prupis*, 162 F.3d 1090 (11th Cir. 1998).

1. In 1983, petitioner was hired to serve as SIG's president. He also became a member of SIG's board of directors. Petitioner claims that for the first five years of his tenure, unbeknownst to him, several of SIG's officers were committing a series of unlawful acts, including embezzling corporate funds, violating promises to indemnify contractors, and giving deliberately falsified financial statements to SIG's creditors and shareholders.

In 1988, petitioner purportedly became aware of this alleged misconduct and informed insurance regulators about improprieties in SIG's financial statements. According to petitioner, the other directors, afraid that he might expose their misdeeds, engaged an outside consulting firm to criticize his performance as CEO so as to furnish an excuse for firing him. The consulting firm's report recommended that much of senior management be fired for poor performance. In May 1988, petitioner and other officers of SIG were fired.

2. One year later, petitioner sued SIG's directors in Florida state court alleging claims under that state's RICO statute and under Florida common law. That case was eventually dismissed. Meanwhile, the New Jersey State Insurance Commissioner had brought a shareholder derivative action against SIG and its officers—including petitioner—in New Jersey federal court. Petitioner filed a cross-claim, naming as defendants SIG and respondents. The cross-claim alleged four counts under the federal RICO statute and six state law claims. After SIG filed for bankruptcy protection, petitioner's cross-claim was transferred to the United States District Court for the Southern District of Florida.

Petitioner's cross-claim alleges that SIG's officers fraudulently induced him to make a series of harmful financial decisions by neglecting to inform him about their misdeeds or his imminent dismissal. Those decisions

included: purchasing $75,000 worth of SIG stock, making SIG an unsecured personal loan of $150,000, and joining other directors in personally guaranteeing SIG's $7.5 million bank loan. Petitioner claimed that those inducements, as well as the creation of fictitious reasons for his firing, constitute mail fraud, *see* 18 U.S.C. § 1341, and wire fraud, *see* 18 U.S.C. § 1343, on the part of the respondents, and that the combination of these offenses constituted a "pattern of racketeering" under the federal RICO statute.

Relying on 18 U.S.C. § 1964(c), petitioner asserted a private cause of action for a violation of RICO's criminal conspiracy provision, 18 U.S.C. § 1962(d), alleging damages on the theory that his refusal to participate in and partial disclosure of respondents' alleged activities resulted in his termination.

3. The district court granted respondents' motion for summary judgment, holding, in part, that petitioner could not maintain an action under RICO, because the injury he alleged did not stem from a predicate act of racketeering. The Eleventh Circuit affirmed, holding that a civil RICO conspiracy plaintiff must allege that he was injured by a predicate act of racketeering, not merely by any overt act in furtherance of the RICO conspiracy.

SUMMARY OF ARGUMENT

The court of appeals correctly dismissed petitioner's RICO conspiracy claim. RICO's civil suit provision, 18 U.S.C. § 1964(c), affords a cause of action only to persons "injured" in their business or property by reason of a criminal "violation" of section 1962. 18 U.S.C. § 1964(c).

Petitioner contends that he was "injured" by reason of a "violation" of RICO's criminal conspiracy provision, 18 U.S.C. § 1962(d). That claim is meritless. Petitioner has not been injured by any conduct constituting the "violation" of § 1962(d)—*i.e.*, an unlawful *agree-*

ment—but by something altogether different: an overt act purportedly taken to further that alleged conspiracy. In *Salinas v. United States*, 522 U.S. 52 (1997), this Court held that a section 1962(d) offense consists of a conspiracy *simpliciter*, and that an overt act is neither an element of the offense of conspiracy nor conduct constituting that offense. *Id.* at 63-65. Accordingly, petitioner's injury, which allegedly flows from an act in furtherance of the conspiracy, but not from the conspiracy itself, did not result from a "violation" of RICO's criminal conspiracy provision, 18 U.S.C. § 1962(d).

To put it another way, petitioner's attempt to dress up his run-of-the-mill wrongful termination claim as a civil RICO cause of action fails because he has not suffered *any* harm by reason of a *violation* of section 1962(d). Respondents' purported "conspiracy"—assuming there was one—did not harm petitioner. Instead, petitioner seeks damages from his *wrongful termination*, an act separate from the unlawful agreement that constitutes the "violation" of section 1962 for which petitioner purportedly has brought suit.

The conclusion that section 1964(c) creates no cause of action for the bare criminal agreement that this Court has held to be the essence of a section 1962(d) "violation" is in accord with Congress's intent in enacting section 1964(c): to provide a remedy for businesses that have suffered concrete harm from racketeering offenses—*i.e.*, for conduct that violates the substantive provisions of the criminal statute, 18 U.S.C. §§ 1962(a)-(c). Congress plainly did *not* intend to effect a fundamental departure from the common law by providing a theretofore unknown federal cause of action for *civil* conspiracy.

In sum, the plain language of the statute, its legislative history, and traditional modes of statutory interpretation all point to the conclusion that petitioner failed to state a cause of action for civil conspiracy under RICO. Petitioner's claim was properly dismissed.

ARGUMENT

RICO DOES NOT CREATE A CAUSE OF ACTION FOR CIVIL CONSPIRACY

RICO's civil suit provision, 18 U.S.C. § 1964(c), affords a cause of action only to persons who have been "injured" by "violation[s]" of the criminal provisions of RICO. The only conduct proscribed by 18 U.S.C. § 1962(d) is a bare *agreement* to commit substantive crimes. That "violation" of law is entirely inchoate and could not cause petitioner or any other specific individual—as distinct from the public at large—any "injury." Because the plain language of the statute demonstrates that petitioner does not have a cause of action for civil conspiracy on the basis of his alleged wrongful termination, petitioner's claim must fail.

A. The Plain Language Of Section 1964(c) Affords A Cause Of Action Only To Persons "Injured" By Reason Of A "Violation" Of RICO's Criminal Provisions

In construing RICO, this Court has consistently emphasized that the statutory language "must ordinarily be regarded as conclusive." *United States v. Turkette*, 452 U.S. 576, 580 (1981); *see also Reves v. Ernst & Young*, 507 U.S. 170, 176 (1993). That principle governs this case. RICO's civil suit provision states that "[a]ny person injured in his person or property by reason of a violation of section 1962 . . . may sue therefor." 18 U.S.C. § 1964(c). Petitioner's claim fails because, under the plain terms of the statute, he has not alleged an injury that proximately resulted from any *violation* of section 1962(d).

1. RICO targets "racketeering activity," which it defines as any act "chargeable" under several generically described state criminal laws and any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud. *See* 18 U.S.C. § 1961(1).

Section 1962 of Title 18, entitled "Prohibited activities," defines four distinct crimes. Section 1962(a) prohibits using income derived from a "pattern of racketeering activity" to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce. Section 1962(b) prohibits the acquisition or maintenance of any interest in an enterprise "through" a pattern of racketeering activity. Section 1962(c) outlaws participation in the conduct of an enterprise through a pattern of racketeering activity. Finally, section 1962(d) makes it unlawful "to conspire" to violate any of sections 1962(a)-(c).

Congress provided criminal penalties of imprisonment, fines, and forfeiture for violation of these criminal prohibitions. *See* 18 U.S.C. § 1963. In addition, Congress set out a civil enforcement scheme, 18 U.S.C. § 1964, which sets forth in section 1964(c) a private right of action for persons "injured . . . by reason of a violation of section 1962."

2. Section 1962(d), the criminal provision at issue in this case, makes it unlawful "to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section." 18 U.S.C. § 1962(d). In *Salinas v. United States*, 522 U.S. 52 (1997), this Court held that the phrase "to conspire" bears its "ordinary meaning and definition;" accordingly, the Court held that a RICO conspiracy offense is fully accomplished when the conspirators reach agreement to further a criminal endeavor. *Id.* at 63, 65. Under section 1962(d), as at common law, "[t]here is no requirement of some overt act or specific act in the statute which requires that at least one of the conspirators have committed an act to effect the object of the conspiracy." *Id.* at 63 (citations omitted). The "criminal agreement itself is the *actus reus*" of the crime. *United States v. Shabani*, 513 U.S. 10, 16 (1994); *see also Braverman v. United States*, 317 U.S. 49, 53 (1942) (overt acts do not constitute "part of the crime which the statute defines and makes punishable").

Salinas recognized that RICO embodies the common law rule that, while overt acts may function as "an indispensable mode of corroborating the existence of the conspiracy," *Yates v. United States*, 354 U.S. 298, 334 (1957), those acts do not "meaningfully establish an essential element of the conspiracy," where, as is true of RICO, "there is no overt act requirement in the . . . statute." *United States v. Felix*, 503 U.S. 378, 392 (1992) (Stevens, J., concurring); *see also Shabani*, 513 U.S. at 12 (evidence of overt acts is "offered not to prove overt acts *qua* overt acts, but to prove the existence of the conspiracy"); *Yates*, 354 U.S. at 334 ("[t]he function of the overt act . . . is simply to manifest that the 'conspiracy is at work,' and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence") (citation omitted).

3. The RICO civil suit provision, section 1964(c), affords a cause of action to persons "injured" by a "violation" of section 1962. The term "violation" in section 1964(c) has a precise meaning. In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), this Court construed the term to mean "a failure to adhere to legal requirements." *Id.* at 489. That definition is consistent with the definition of "violation" in other statutes, such as the Continuing Criminal Enterprise Act, 21 U.S.C. § 848(a). As this Court recently recognized in that context, a "violation" is "an act or conduct that is contrary to law." *Richardson v. United States*, 119 S. Ct. 1707, 1710 (1999).

Because section 1964(c) affords a cause of action only to persons injured by a "violation," a plaintiff must, at a minimum, allege that his injury flowed from the "*act* or *conduct* that is contrary to" the statute. *Richardson*, 119 S. Ct. at 1710 (emphasis added); *Sedima*, 473 U.S. at 489. Indeed, this Court recognized as much in *Sedima*, in which this Court held that a "plaintiff only has standing to sue [under section 1964(c)] if he has been injured in his business or property by the *conduct*

constituting the violation." *Sedima*, 473 U.S. at 496 (emphasis added).

4. Petitioner contends that he was "injured" by reason of a "violation" of the RICO conspiracy provision, section 1962(d). That claim is without merit. Petitioner has not been injured by the conduct constituting the violation of section 1962(d)—a mere agreement to violate the substantive provisions of 18 U.S.C. §§ 1962(a)-(c)—but by something altogether different: an overt act purportedly taken to further that agreement.

An overt act done in furtherance of a conspiracy is not "conduct constituting [a] violation" of section 1962(d). *See Sedima*, 473 U.S. at 496. As set forth in *Salinas*, the conduct constituting the offense of conspiracy is the act of agreement itself—nothing more. The damage that petitioner sustained as a result of his purportedly wrongful termination is not, therefore, injury suffered by reason of a "violation" of section 1962(d). Petitioner's injury occurred by reason of an overt act in furtherance of the conspiracy, but not by reason of the conspiracy itself.

The courts that have granted standing to plaintiffs injured by an "overt act" fail to appreciate the significance of that distinction, frequently collapsing the crucial difference between injury that results by reason of an overt act and injury that results by reason of a conspiracy. Some courts purport to gloss that distinction by emphasizing that the particular overt act was "essential" to or "closely intertwined" with the conspiracy's object. Whether an overt act was expressly done "in furtherance" of the conspiracy, *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1169 (3d Cir. 1989), "essential" to the conspiracy, *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 295 (9th Cir. 1990) (citation omitted), "critical" to the conspiracy, *Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143, 153 (5th Cir. 1997), *rev'd on other grounds*, 119 S. Ct. 442 (1998), "directly related" to the conspiracy's goals, *Schiffels v. Kemper Fin. Servs., Inc.*,

978 F.2d 344, 351 (7th Cir. 1992), or "not outside the scope of [the] conspiracy," *Williams v. Hall*, 683 F. Supp. 639, 643 (E.D. Ky. 1988), is irrelevant, however, because even if the overt act would not have occurred *but for* the existence of the conspiracy, and even if the causal nexus between the conspiracy and overt act is immediate and direct, the overt act is not *itself* a "violation" of section 1962(d).

Put another way, section 1964(c) does not give a cause of action to persons injured "by reason of conduct in furtherance" of a RICO violation; it gives a cause of action to persons injured by the "conduct *constituting* the violation." *Sedima*, 473 U.S. at 496 (emphasis added). A section 1962(d) "violation" is constituted by the *agreement* of the parties to further a criminal endeavor, *see Salinas*, 552 U.S. at 63—nothing more. The plain language of the statute gives a cause of action only to persons injured by reason of that conduct.

5. Petitioner's claim that the proximate cause requirement announced in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), is the "appropriate limiting factor," Pet. Br. at 27, for determining whether a person has been "injured" under RICO, misses the point.

Petitioner's argument conflates two distinct statutory requirements: section 1964(c)'s command that a plaintiff's injury *result* from ("by reason of") a proscribed act, which is properly examined under principles of proximate causation, and section 1964(c)'s threshold requirement that a "violation" of the criminal provisions of RICO must be shown as the indispensable predicate for any type of causation analysis, "proximate" or otherwise. Proximate causation demands that there be "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. No principle of proximate causation, however, supports petitioner's attempt to disregard the limits that the legisla-

ture has established as the threshold condition to civil liability.

Thus, although the proximate causation requirement limits the extent to which a wrongdoer may be held responsible for the consequences of his wrongful conduct, petitioner may not trigger that analysis by claiming to have been injured by just *any* act. The "injurious conduct" that serves as the starting point in the analysis must be conduct that the law otherwise makes actionable. Only *after* that conduct is identified may causation analysis properly proceed.[2]

Here, the statute identifies the conduct to which the directness of the plaintiff's injury must be assessed. That conduct is a "violation" of section 1962(d)—an agreement to further a criminal endeavor. Petitioner does not purport to have suffered damage as a result of *that* conduct, but rather he claims an injury resulting from conduct "in furtherance" of it. No proximate causation analysis is necessary in this case, because petitioner has attributed injury to conduct that is not actionable under the statute. Indeed, petitioner's analysis reads the word "violation" out of section 1962(d).

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[2] The doctrine of proximate causation does not determine *in the first instance* whether conduct is wrongful. It is possible, for example, to assess whether X is the proximate cause of consequences A and B without making a judgment that X is contrary to law. Put another way, a proximal relation *alone* between conduct and harm does not *ipso facto* render that conduct wrongful (*i.e.*, that X is a proximate cause of consequences A and B does not necessarily make X wrongful). Proximate cause determines only whether a person whose conduct is *otherwise* wrongful should be held liable for the consequences of his conduct. The doctrine presupposes that the first link in the chain of causation—the starting point from which the causation measurement is taken—is a wrongful act.

In sum, petitioner's embrace of "proximate causation" does not avail petitioner much, because the conduct constituting the violation of section 1962(d)—the conduct which must be the first link in the chain of causation—is not the proximate cause of petitioner's injury. Indeed, *no one* is injured by a confederation or agreement alone. *See, e.g., Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 386 (8th Cir. 1993) ("A nonconspirator cannot be injured in his or her business or property by a mere agreement to violate RICO"); *Schiffels*, 978 F.2d at 348 ("[A]n agreement to violate RICO, standing alone, cannot harm anybody"); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990) (same). A conspiracy *simpliciter* simply does not cause private injury.

Accordingly, the plain language of the statute establishes that petitioner's wrongful termination claim is not cognizable under RICO. RICO does not authorize suits for civil conspiracy.

B. Conventional Rules Of Statutory Interpretation Establish That Section 1964(c) Does Not Create A Private Right Of Action For Civil Conspiracy

The conclusion that section 1964(c) *never* confers a cause of action for conspiracy *per se* is inescapable when three traditional canons of statutory interpretation are applied to the text.

1. First, Congress "expects its statutes to be read in conformity with this Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997). Long before RICO was enacted, it was well understood that the criminal law takes aim at conspiracy because it "poses distinct dangers quite apart from those of the substantive offense." *Iannelli v. United States*, 420 U.S. 770, 778 (1975). Those dangers derive from the fact that conspiracy is a "partnership in crime." *Callanan v. United States*, 364 U.S. 587, 593 (1961). Concerted action makes more

likely the completion of the substantive offense and the commission of crimes unrelated to the original purpose for which the group was formed, and it "educat[es] and prepar[es] the conspirators for further and habitual criminal practices." *United States v. Rabinowich*, 238 U.S. 78, 88 (1915); *see also Pinkerton v. United States*, 328 U.S. 640, 644 (1946). Thus, although conspiracy is, at its core, an "inchoate offense," *Iannelli*, 420 U.S. at 777, it is considered to be "an offense of the gravest character" because of its *potential* for inflicting severe "injury *to the public*." *Rabinowich*, 238 U.S. at 88 (emphasis added).

A civil cause of action, by contrast, is invariably given to victims of *actual* harm. Had Congress intended to create a new cause of action for the act of reaching agreement—an act which itself causes no particularized injury to any individual—it may be presumed that "there would have been at least some mention of it in the legislative history." *Sedima*, 473 U.S. at 490. There is nothing in the legislative history, however, to suggest that Congress in enacting RICO understood itself to be creating a new cause of action for unlawful agreement.

Instead, the legislative history of the statute is replete with references to the actual harm that racketeering conduct—the target of the substantive offenses set forth at 18 U.S.C. § § 1962(a)-(c)—inflicts upon legitimate businesses. That legislative history was painstakingly reviewed both by the majority and dissenters in *Sedima*, *see* 473 U.S. at 486-88, 510-20, and it is not necessary to rehash that history here except to note that *both* the majority *and* dissent agreed that the civil suit provision was motivated by the notion that "[t]hose who have been wronged by organized crime should at least be given access to a legal remedy," *id.* at 487, 515-16, and that Senator Hruska, a principal sponsor of the bill, thought the civil remedy necessary because "the honest businessman who has been damaged by unfair competition from the racketeering businessman . . . does not have

adequate civil remedies" to gain him recompense for his injuries. *Id.* at 516 (citation and quotation omitted).

That legislative history, while not conclusive, evinces preoccupation with *actual harm* suffered by legitimate businesspeople by virtue of the racketeering activity proscribed in sections 1962(a), (b), and (c). Nothing in the legislative history suggests that Congress contemplated the interplay between section 1964(c) and section 1962(d), much less intended to create out of whole cloth a theretofore unknown *civil* cause of action for conspiracy.

2. Congress also must be understood to have legislated against the background of the common law "except when a statutory purpose to the contrary is evident." *Astoria Federal Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (quotation and citation omitted). At common law, civil conspiracy was not, by itself, an independent cause of action.[3] "Being a civil remedy, the

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[3] *Robinson v. Parks*, 24 A. 411, 413 (Md. Ct. App. 1892) ("[T]he simple act of conspiracy does not furnish a substantive ground of action"); *Domchick v. Greenbelt Cons. Servs., Inc.*, 87 A.2d 831, 834 (Md. Ct. App. 1952) ("No action in tort lies for conspiracy to do something unless the acts actually done, if done by one person, would constitute a tort"); *Beechley v. Mulville*, 70 N.W. 107, 110 (Iowa 1897) ("The general rule is that a conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give the right of action") (quotation marks and citation omitted); *Root v. Rose*, 72 N.W. 1022, 1023 (N.D. 1897) ("The charge of conspiracy adds nothing to the case. A conspiracy, if proved, might augment the damages; but it would not of itself transmute nonactionable into actionable facts"); *Delz v. Winfree*, 16 S.W. 111, 111 (Tex. 1891) ("[A] conspiracy cannot be made the subject of a civil action, although damages result, unless something is done which, without the conspiracy, would give a right of action"); *Jayne v. Drorbaugh*, 17 N.W. 433, 437 (Iowa 1883) (same); *Diver*

gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff." *James v. Evans*, 149 F. 136, 140 (3d Cir. 1906).[4] The doctrine was no more than a "convenient and proper mode of alleging [a] combination and [united] action" on the part of multiple tortfeasors. *City of Boston v. Simmons*, 23 N.E. 210, 211 (Mass. 1890).[5]

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v. Miller, 148 A. 291, 292 (Del. Super. Ct. 1929) ("If, however, there be no right of action in the plaintiff against the defendants, or either of them, independent of the conspiracy, there can be no recovery though a conspiracy be alleged").

4 *See also Porter v. Mack*, 40 S.E. 459, 460 (W. Va. 1901) ("The gist of the action is the injury produced"); *Van Horn v. Van Horn*, 28 A. 669, 670 (N.J. 1894) ("[I]n an action on the case for conspiracy, the gist of the action is not the conspiracy, but the damage done to the plaintiff. . . . [C]onspiracy is not the groundwork of the action, but the damages done to the party"); *City of Boston*, 23 N.E. at 211 ("The gist of the action is not the conspiracy alleged, but the tort committed against the plaintiff, and the damage thereby done it wrongfully"); *Von Au v. Magenheimer*, 110 N.Y.S. 629, 632 (App. Div. 1908) ("In a civil action for conspiracy the gist of the action is the damage, not the conspiracy").

5 *See also Robinson v. Van Hooser*, 196 F. 620, 623 (6th Cir. 1912) ("Since to hold defendants liable in actions like this it is necessary to prove a combination and united action on their part, the conspiracy averments afford a convenient means of alleging such combination and action"); *Von Au*, 110 N.Y.S. at 632 ("[T]he averment and proof of conspiracy is only important to join all the defendants and hold them responsible for the acts and declarations of each"); *Robinson v. Parks*, 24 A. 411, 413 (Md. Ct. App. 1892) ("The party wronged [by a tort] may look beyond the actual participants in committing the injury, and join with them as defendants all who conspired to accomplish it").

It would be wholly incongruous for Congress to have enacted section 1962(d) on "the common-law footing," *Nash v. United States*, 229 U.S. 373, 378 (1913)—that is, by defining the offense as a conspiracy *simpliciter*, *Salinas*, 552 U.S. at 63—and, at the same time, to have effected a radical transformation of the common law by creating a novel and unprecedented cause of action for civil conspiracy. That result is all the more anomalous given that the crime of conspiracy has been targeted historically because it is an inchoate offense inherently dangerous to the *public*, and not a crime that in and of itself causes ascertainable *private* injury to anyone. *Iannelli*, 420 U.S. at 770; *Rabinowich*, 238 U.S. at 88.

3. Congress "will not be deemed to have significantly changed the federal-state balance" absent a clear sign of legislative intent. *United States v. Culbert*, 435 U.S. 371, 379 (1978) (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). Petitioner's view would sanction the proposition that Congress intended to federalize an enormous range of conduct historically regulated by the states and to impose liability on an unimaginably broad range of conduct—the universe of "overt acts"—heretofore thought to have been the proper concern of state law enforcement, if not wholly innocuous.

That petitioner has brought a claim for "wrongful termination" under RICO illustrates this danger perfectly. Florida common law does not recognize the tort of wrongful termination. *See Scott v. Otis Elevator Co.*, 572 So. 2d 902, 903 (Fla. 1990); *Smith v. Peizo Tech. & Prof'l Admrs.*, 427 So. 2d 182, 184 (Fla. 1993); *DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253 (Fla. 1980).[6] By dressing up his wrongful termination

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6 In 1991, Florida enacted the Whistle Blower's Act, Fla. Stat. §§ 448.101-05, prohibiting retaliatory termination in the private sector. The Supreme Court of Florida has held that the statute does not apply retroactively. *See Arrow Air, Inc.*

claim as an "overt act" in furtherance of a section 1962(d) conspiracy, however, petitioner has effectively bypassed that State's decision not to protect against the type of injury he purports to have suffered.

Many other examples abound. At common law, as well as under the federal conspiracy statute, 18 U.S.C. § 371, overt acts can be wholly innocuous. *See* Wayne R. LaFave & Austin W. Scott, CRIMINAL LAW 549 (2d ed. 1986) ("[V]irtually any act will satisfy the overt act requirement"); *see also United States v. O'Brien*, 972 F.2d 47, 52-53 (3d Cir. 1992) (citations omitted) ("an interview with a lawyer, attending a lawful meeting, and making a phone call, have all been held to be overt acts sufficient to support a conspiracy conviction") (citations omitted).[7] The gloss on section 1964(c) urged by petitioner effectively would subject such acts to civil liability provided they were "essential to" or "directly related" to a conspiracy, rendering RICO a "font of tort law," *Paul v. Davis*, 424 U.S. 693, 717 (1976), unrivaled by any other federal statute or constitutional provision.

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v. Walsh, 645 So. 2d 422, 425 (Fla. 1994). Accordingly, the statute would not provide a cause of action to petitioner, who was terminated in 1988. Petitioner, however, is free to assert available contract claims, if any, in state court.

7 That notion is reflected in the Department of Justice RICO manual, which explicitly distinguishes "racketeering acts," which "must be violations of the offenses listed in 18 U.S.C. § 1961," and overt acts, which "should be ordinary actions, such as meetings, conversations, and other general activities." THE DEPARTMENT OF JUSTICE MANUAL § 9-110A.1 00 at 99-100 (1991-1 Supp.). The Manual instructs prosecutors that "[a]lthough they may be criminal in nature, the overt acts, unlike the racketeering acts, should not be alleged as criminal offenses. It is extremely important to avoid confusing these two concepts." *Id.*

Congress could not possibly have intended such an anomalous result.

C. The Plain Meaning Of The Statute Does Not Render Any Portion Of The Statute Mere Surplusage Or Produce An Absurd Result

1. Petitioner's principal objection to according the statute its plain meaning is that such a construction purportedly would render section 1962(d) "superfluous" in the civil setting. Because a plaintiff is never "injured" by reason of a "conspiracy" *alone*, to have a cause of action under section 1964(c) a plaintiff would be required to demonstrate injury by reason of a violation of one of sections 1962(a)-(c). According to petitioner, this would render section 1962(d) "superfluous" for civil plaintiffs. *See* Pet. Br. at 19.

That objection is not persuasive. Although this Court does not construe statutes in a manner that "render[s] their provisions mere surplusage," *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997), that principle operates to bar interpretations that render statutory words "of no consequence" in all of the statute's applications. *See Ratzlaf v. United States*, 510 U.S. 135, 141 (1994). This Court has never endorsed the sweeping proposition that courts must construe each provision in a legislative enactment in a manner that will render that provision pertinent to each conceivable application of the act.

That principle would be especially unwarranted and unworkable if applied to RICO, the text and structure of which mandate substantial interplay between the civil remedies provision in section 1964, the statutory violations enumerated in 1962, and the predicate acts and operative terms defined in section 1961. Complete integration and complementarity of one provision to another under such a complex statutory scheme is neither practicable nor expected.

Indeed, this Court already has rejected a similar argument in the RICO context. In *United States v. Turkette*, 452 U.S. 576 (1981), this Court held that the term "enterprise" as defined in section 1961(4) refers to both legitimate and illegitimate enterprises, rejecting the claim, similar to that raised by petitioner here, that the plain meaning would "create several internal inconsistencies in the Act." 452 U.S. at 582. The court of appeals had held that the term refers only to "legitimate enterprises," reasoning:

> [Since] a "pattern of racketeering" can itself be an "enterprise" for purposes of section 1962(c), then the two phrases "employed by or associated with any enterprise" and "the conduct of such enterprise's affairs through [a pattern of racketeering activity]" add nothing to the meaning of the section. The words of the statute are coherent and logical only if they are read as applying to legitimate enterprises.

452 U.S. at 582 (quoting *United States v. Turkette,* 632 F.2d 896, 899 (1st Cir. 1980)). The Court dismissed that argument as resting on the faulty premise that a "pattern of racketeering" is an "enterprise." *Id.* at 583. Moreover, the Court pointedly observed, "even if that were not the case, the Court of Appeals' position on this point is of little force. *Language in a statute is not rendered superfluous merely because in some contexts that language may not be pertinent.*" 452 U.S. at 583 n.5 (emphasis added).

That principle applies to this case. The plain meaning of the statute establishes only that a criminal conspiracy cannot be the predicate "violation" for a cause of action under section 1964(c). Section 1962(d) is hardly "surplusage" under that interpretation. Its powerful sweep operates will full force, and to full effect, in the criminal setting.

Indeed, *Turkette* explicitly rejected the notion that the existence of the civil remedies bears on the scope of the criminal provisions of section 1962. The First Circuit supported its "legitimate enterprise" requirement in that case in part on the ground that various civil remedies were provided by section 1964, including divestiture, dissolution, reorganization, restrictions on future activities by violators of RICO, and treble damages, and that these remedies would only have utility with respect to legitimate enterprises. 452 U.S. at 585. This Court concluded that "[e]ven if one or more of the civil remedies might be inapplicable to a particular criminal enterprise, this fact would not serve to limit the enterprise concept." *Id.* "Congress has provided civil remedies," the Court observed, "*for use when the circumstances so warrant.* It is untenable to argue that their existence limits the scope of the criminal provisions." *Id.* (emphasis added).

Turkette thus soundly rejects the interpretive directive that petitioner asserts to be dispositive here. Congress has provided a cause of action in section 1964(c) for persons injured by reason of a "violation" of the RICO criminal provisions. That section, however, in no way alters "the scope of the criminal provisions." *Turkette*, 452 U.S. at 585. The scope of RICO conspiracy under section 1962(d) was settled in *Salinas*, and neither the existence of section 1964(c), nor petitioner's faulty "surplusage" argument, alter the fact that petitioner has not been injured by a "violation" of that provision.

D. Summary Judgment Was Appropriately Entered Against Petitioner

Summary judgment was appropriately entered against petitioner. Summary judgment is proper where the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23

(1986). That is the case here. Petitioner has adduced no evidence that he has been injured by reason of a "violation" of the RICO criminal conspiracy provision. Petitioner seeks damages for injury he claims to have incurred as a result of his purportedly wrongful termination; he seeks no damages incurred by reason of the respondents' purportedly unlawful agreement, which is what section 1962(d) prohibits. Petitioner therefore states no cause of action under section 1964(c), and judgment was properly entered against him.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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September 17, 1999

Supreme Court, U.S.
FILED
SEP 17 1999
OFFICE OF THE CLERK

(10)

No. 98-1480

IN THE
Supreme Court of the United States

ROBERT A. BECK, II,
Petitioner,
v.
RONALD M. PRUPIS, *ET AL.*
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AND HEALTH INSURANCE ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS LEONARD BELLEZA, ERNEST J. SABATO, WILLIAM PAULUS, JR., AND HARRY OLSTEIN

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QUESTION PRESENTED

Whether Congress intended to federalize traditional state law breach of contract and wrongful termination claims by allowing a plaintiff to maintain a civil Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy claim for treble damages despite the lack of any evidence that plaintiff's alleged harm was proximately caused by a pattern of racketeering.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

INTEREST OF *AMICI CURIAE**

The American Tort Reform Association ("ATRA"), founded in 1986 and based in Washington, D.C., is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms who have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability

* Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no persons or entities, other than the *amici*, have made a monetary contribution to preparation or submission of this brief.

in civil litigation. For over a decade, ATRA has filed principal *amicus curiae* briefs in cases before this Court that have addressed important liability issues, including the Court's recent "expert opinion" decisions in *Kumho Tire Co. v. Carmichael,* 119 S. Ct. 1167 (1999), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Court's rejection of medical monitoring claims in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997), the landmark punitive damages decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and the Court's decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), regarding federal preemption of state tort law.

The Health Insurance Association of America ("HIAA"), based in Washington, D.C., is one of the largest associations of health insurance companies in the world. HIAA is a leading advocate for the private, market-based health insurance system. Its more than 260 members provide medical expense and supplemental insurance, as well as long-term care insurance and disability income protection to more than 123 million people – one out of two non-elderly Americans. HIAA develops and advocates federal and state policies which build upon our health care system's quality, affordability, accessibility, and responsiveness.

Amici submit this brief to indicate their strong support for the holdings of the majority of the federal courts of appeals, including the Eleventh Circuit Court of Appeals in the instant case, which have wisely held that a plaintiff alleging a civil Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy claim under must show that his or her injury proximately resulted from a pattern of racketeering. *Amici* are concerned that the minority position, which Petitioner asks this Court to adopt, would create a new and unfair "federal tort" with potential treble damages liability for garden-variety breach of contract and wrongful termination claims that should be a matter of state law and have been since the time of the Founding Fathers. Finally, as a matter of public policy, this approach flies in the face of principles of federalism and respect for States' rights.

Petitioner's construction goes far beyond what Congress has authorized under RICO and is inconsistent with the Court's prior rulings. This Court does not need to adopt Petitioner's construction of RICO either to deter racketeering activity or to compensate persons for harms allegedly incurred as a result. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).

For these reasons, *amici* urge this Court to affirm the decision of the Eleventh Circuit Court of Appeals.

STATEMENT OF THE CASE

Amici adopt Respondents' summary of the dispute in question.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Permitting civil RICO conspiracy claims despite any evidence that a plaintiff has been harmed as the proximate result of a pattern of racketeering would create a new federal cause of action: (1) inconsistent with Congressional intent; (2) inconsistent with the Court's prior rulings; (3) that violates principles of federalism and States' rights; and (4) that would be both unsound and unnecessary. This Court should not rewrite the RICO statute to provide remedies that are not grounded in the statute itself; it should be left to Congress, if it desires to do so, to change the law.

ARGUMENT

I. BOTH THE INTENT AND PLAIN MEANING OF RICO ARE BEST SERVED BY AFFIRMING THE COURT OF APPEALS' DECISION THAT PETITIONER FAILED TO ESTABLISH A CIVIL RICO CONSPIRACY CLAIM.

Congress intended for plaintiffs alleging civil Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy claims to prove that their injuries were proximately caused by a pattern of racketeering. *See* 18 U.S.C. 1964(c) (permitting recovery for injury "by reason of a violation of section

1962"). This conclusion is supported by a majority of the federal courts of appeal that have ruled on the issue. *See Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir.), *cert. denied*, 508 U.S. 957 (1993); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 48 (1st Cir. 1991); *Reddy v. Litton Industries, Inc.*, 912 F.2d 291, 294-95 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990); *Morast v. Lance*, 807 F.2d 926, 933 (11th Cir. 1987); *O'Malley v. O'Neill*, 887 F.2d 1557, 1561-62 (11th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990). As set out below, there is sound support for this conclusion.

A. A Contrary Reading Would Be Inconsistent With The Court's Prior Rulings.

Section 1964(c) of RICO creates a federal private right of action and the potential recovery of treble damages for anyone injured "by reason of a violation of section 1962." Section 1962 consists of three substantive subsections, 18 U.S.C. § 1962(a)-(c),[1] and a subsection concerning conspiracy to violate any of the three substantive provisions, 18 U.S.C. § 1962(d).

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[1] Section 1962(a) prohibits the investment of proceeds derived from a pattern of racketeering activity in any enterprise involving interstate commerce. Section 1962(b) prohibits acquisition through a pattern of racketeering activity of any interest in an enterprise involving interstate commerce. Section 1962(c) prohibits participation in the conduct of an enterprise involving interstate commerce through a pattern of racketeering activity.

To prove a RICO violation under any of the three substantive provisions, a plaintiff must show that he or she suffered injury as a result of a "pattern of racketeering activity." 18 U.S.C. § 1961(5) (defining "pattern" as at least two acts of racketeering activity within ten years of one another). To prove a violation of the conspiracy provision requires only proof of an agreement to violate a substantive section of 1962; there is no separate overt act requirement. *See Salinas v. United States*, 522 U.S. 52 (1997).

In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), the Court established a limitation upon civil RICO recoveries under 18 U.S.C. § 1964(c). The case concerned the claim of a federally created corporation, the Securities Investor Protection Corp. ("SIPC"), which was acting to protect the rights of customers of a brokerage firm who suffered indirect harm as a result of a stock-manipulation scheme directed against the firm.

The Court in *Holmes* said that, while a literal reading of the statute would permit a recovery based on mere "but for" factual causation, that construction was "hardly compelled." *Id.* at 266. The Court found that it was very unlikely that this was the result intended by Congress. *Id.* Consequently, the Court held that the phrase "by reason of" in Section 1964(c) of RICO meant not merely factual causation, but also imposed the additional requirement of proximate cause stemming from a violation of

section 1962. *Id.* at 268.[2] The Court then ruled that the losses for which the SIPC sought recovery were too remote. *See id.* at 270. The proximate cause requirement is a significant barrier that prevents a deluge of claims by parties potentially indirectly injured in a wide variety of circumstances (*e.g.*, stockholders, policyholders, union members, customers, and employees).

B. Requiring Injury Proximately Resulting From A "Pattern of Racketeering" Is Proper In Civil RICO Cases.

The effect of the *Salinas* decision on cases such as Petitioner's case is that a mere agreement to conspire to violate one of the substantive provisions of 18 U.S.C. § 1962 constitutes a RICO violation. A different agreement, such as an agreement to discharge an employee, is not in itself a conspiracy to violate one of the three substantive provisions and, therefore, is not a RICO violation.

The Court's holding in *Salinas* impacts criminal and civil cases differently. In criminal law cases, where the purpose of the conspiracy charge is to punish the act of agreement itself, the prosecutor does not need to prove that the agreement to engage in criminal activity resulted in an injury-causing

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[2] The Court was guided by the fact that the federal antitrust statutes which served as a model for RICO had been read to incorporate common law principles of causation. *See Associated Contractors of Calif. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

event. *See* Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 6.4(d) (2d ed. 1986).

For example, if a group of individuals takes steps to commit a bank robbery that is foiled by police before the robbery is committed, the would-be bank robbers are subject to prosecution for conspiracy to commit bank robbery. The agreement is punishable as a crime by itself, because of "the special danger [to society] incident to group activity." *Id.* at § 6.4(c).

In a civil context, however, as *Holmes* makes clear, a mere agreement "in the air" to conspire does not proximately cause any direct injury. Thus, in the example, while the would-be bank robbers could be subject to criminal prosecution for conspiring to rob the bank, they could not be subject to a civil conspiracy claim by the bank, because it never suffered a direct harm. *See Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990) (recognizing the break in the chain of causation flowing from a mere agreement in the context of RICO).

This distinction reflects a fundamental difference between traditional tort law and criminal law. Tort law requires that the plaintiff suffered a harm proximately caused by a defendant's conduct; criminal law requires a wrongful act that has been deemed by a legislature to be against public policy. *See generally* W. Page Keeton *et al., Prosser and Keeton on the Law Of Torts* § 46 (5th ed. 1984); Restatement (Second) of Torts § 491.

Consequently, plaintiffs such as Petitioner cannot establish proximate cause as required by *Holmes*,

because their injuries are too remote. The civil RICO conspiracy claim still serves a purpose, however, because claimants that can prove direct injury through one of RICO's substantive provisions may hold any one of the alleged conspirators jointly liable for the entire harm.

C. Petitioner Failed To Prove Injury Proximately Resulting From A Pattern Of Racketeering.

Petitioner has resorted to trying to prove a violation of RICO's conspiracy provision because he has failed in his effort to prove a violation of one of RICO's three substantive provisions. *See Beck v. Prupis*, 162 F.3d 1090 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 2046 (1999). He is left arguing conspiracy "in the air." His claim should be barred based on remoteness. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). *Cf. Associated Contractors of Calif. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

II. FINDING THAT RICO COVERS PETITIONER'S CLAIM WOULD CREATE A NEW FEDERAL TORT FOR EMPLOYMENT-BASED DISPUTES THAT ARE GOVERNED BY STATE LAW AS WELL AS INTRODUCE A MAJOR NEW FACTOR INTO EMPLOYMENT AND LABOR RELATIONS.

A. Congress Did Not Intend To Federalize Well-Established State Law Remedies.

Petitioner's construction of the civil RICO conspiracy provision would create a new federal tort

with potential treble damages liability for many ordinary state breach of contract, wrongful termination, and fraud claims.

It also would allow plaintiffs to circumvent the requirements of the three substantive subsections of RICO, *see* 18 U.S.C. § 1962(a)-(c), simply by alleging a conspiracy. Congress could not have intended to create such a gaping loophole. While Congress may have wanted the RICO statute to be liberally construed to effectuate its remedial purposes – *i.e.*, to address the influences of organized crime and acts of racketeering – this Court itself has recognized the key practical difference between liberally construing the RICO statute and giving it a content that was never intended by Congress. *See Holmes v. Securities Inv. Protection Corp.*, 503 U.S. 258 (1992).

If Congress had intended to enact a statutory scheme that would, in effect, largely displace an area of law that has been left to the States, one would find evidence of that intent. *Cf. Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 333 (1994) ("Principles of federalism compel this view, for a statute is interpreted to pre-empt traditional state powers only if that result is the clear and manifest purpose of Congress."). There is no such meaningful evidence in the statute or RICO's legislative history.

This is not surprising. As a general matter, it has been ATRA's experience, for more than two decades of direct work on federal liability reform initiatives that Congress is very hesitant to "federalize" state tort law unless there is a

compelling justification to do so. That justification does not exist in the present case.

B. Petitioner's Construction Is Unnecessary.

Permitting recovery through the civil RICO conspiracy provision for claims such as Petitioner's is unnecessary. As the Supreme Court noted in *Holmes*, recoveries by directly injured plaintiffs provide adequate deterrence against harmful conduct. *See Holmes*, 503 U.S. at 269-70. There is also the possibility of criminal liability, if the requisite elements are met.

The circuit courts have been a good laboratory in this regard. Racketeering activity has not notably increased in the circuits that are in accord with the Eleventh Circuit's decision below.

Furthermore, with respect to persons such as Petitioner, who allege indirect harm as a result of a conspiracy resulting in direct harm to others, a federal cause of action is not needed. State statutory and common law tort and other claims are generally available to such plaintiffs and have been used both prior to and after RICO's enactment.

C. An Expansive Reading of RICO Will Only Aggravate RICO's Deleterious Impact On The Legislatively-Established Balance Governing Labor And Employment Issues.

With its expansive growth and encroachment upon traditional areas of labor and employment relations, the developing RICO jurisprudence poses a distinct threat to the delicate balance of factors that state legislatures and Congress have established. Commentators have noted that as a consequence of broader-than-broad interpretations by the courts, "RICO is upsetting the rules of the game in the areas of labor and employment law." Thomas F. Harrison, *Look Who's Using RICO*, 75 A.B.A. J. 56, 56 (Feb. 1989).

Petitioner's claims are representative of a particular class of these cases. Indeed, the area of employee discharges has been identified as the one most affected by the trend of RICO jurisprudence. *See* Laura Ginger, *Employers' RICO Liability for the Wrongful Discharge of Their Employees*, 68 Neb. L. Rev. 673, 673 (1989). The possibility of treble damages provides a strong incentive for discharged employees to convert simple employment disputes into allegations that aggressive business practices constitute racketeering activity for RICO purposes, significantly raising the nuisance value of such suits. The terminated worker's employer is then faced with the decision to defend a much more expensive suit with the potentially significant reputation-damaging publicity that accompanies racketeering accusations, or to accede to an aggrieved former employee's demand for settlement.

As time has passed, sweeping interpretations of RICO have even become an unwelcome factor in the more structured area of labor-management relations. *See* Raymond P. Green, *The Application of RICO to Labor-Management and Employment Disputes*, 7 St. Thom. L. Rev. 309, 309 (1995) (noting that RICO "has disrupted the labor-management relationship" and can now be used "to upset the tenuous balance of power that is the hallmark of labor-management relations").

For example, in the area of labor-management relations, Congress has already specifically designed a framework to address such issues in the National Labor Relations Act, 29 U.S.C. §§ 141 *et seq.*, and related statutes. Through the expansive growth of RICO, plaintiffs from both sides of the labor-management equation are now attempting to bring issues related to striking and picketing or plant closures and corporate reorganizations under RICO's hammer as opposed to resorting to the statutory devices already in place to address these matters.

Novel or strained interpretations of RICO thus promote the abuse of RICO as a bargaining tool and pose the risk of causing significant and unpredictable shifts in the carefully established balance of labor and employment interests under existing legislative schemes. The presence of these additional consequences flowing from an expansive reading of RICO in the context of this case counsels against resorting to such a reading unnecessarily.

III. THE COURT SHOULD DEFER TO CONGRESS AS THE APPROPRIATE BRANCH TO CONSIDER ANY EXPANSION OF RICO'S REACH.

Petitioner's desire to obtain a new federal tort remedy that is not grounded in the RICO statute should be addressed by Congress, not judicially created by courts. This is particularly the case where, as here, the cause of action is not a development of the common law but is statutorily-based. *See generally* Roger S. Fine, *A Personal Perspective from the "Manufacturer,"* 55 Brook. L. Rev. 899, 903 (1989) ("[L]et us go back to the days when there was a real difference between the judicial and legislative branches. When a court is faced with a problem that is a social one rather than a legal one, we defer to the legislature, which has far more flexibility and power to mold solutions that match our problems").

As this Court has stated, when "[m]any groups of persons with varying interests are vitally concerned . . . . We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups." *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 286 (1951). *See also Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1138 (5th Cir. 1995) ("[T]he Congress is in a better position than a court to evaluate various policy objectives. We are persuaded that deferring to congressional action here is the wiser course.").

CONCLUSION

For these reasons, the decision of the Eleventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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Dated: September 17, 1999